THE HISTORY OF THE COMMON LAW;

BY

SIR MATTHEW HALE, KNT.

LORD CHIEF JUSTICE OF ENGLAND IN THE REIGN OF CHARLES THE SECOND.

THE FOURTH EDITION CORRECTED;

WITH NOTES, REFERENCES, AND SOME ACCOUNT OF THE LIFE OF THE AUTHOR,

By CHARLES RUNNINGTON, ESQ.

BARRISTER AT LAW.

LONDON:

PRINTED BY W. STRAHAN AND M. WOODFALL, LAW-PRINTERS TO THE KING'S MOST EXCELLENT MAJESTY;

FOR T. CADELL, IN THE STRAND.

MDCCLXXIX.


G.R. III.

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THE

PREFACE.

SO authoritative an hiſtory of the Common Law of England, written by ſo learned an author, required neither preface nor recommendation. Tho' the approbation of Sir Matthew Hale was of itſelf ſufficient to inſure ſucceſs to any production; yet this hiſtory was diſmiſſed from the cloſet, without ſoliciting indulgence by a prefatory diſcourſe, or claiming reſpect from the authority of his name. It were needleſs to mention the rapid ſucceſs which attended, or the generous applauſe which was beſtowed on, its firſt publication; it is ſufficient for me to obſerve, that it has ever been juſtly held in the higheſt eſtimation; and, like the virtue of its author, been univerſally venerated and admired.—Here the ſtudent will find a valuable guide;---the barriſter a learned aſſiſtant;—the court an indiſputable authority. Could I add any thing to it,s weight, the ſcope of my ambition would amply be completed; but the indulgence even of a thought in that reſpect, would in me be the very ſummit of vanity. I cannot claim praiſe from reviſion, for I by no means deſerve it; yet I would willingly eſcape cenſure, becauſe I have diligently applied the little all of my abilities, faithfully to execute the taſk of Editor. Peculiarly fortunate ſhall I eſteem myſelf, if enabled to ſay with Horace,

——————VITAVI DENIQUE CULPAM,
NON LAUDEM MERUI.

C. Runnington.
1779.

ADVERTISEMENT.

THE capital letters, in the body of the enſuing work, refer to the larger notes; which, under thoſe characters, are inſerted at the end of each chapter. As for inſtance, the letters [A] [B] [C] &c. — refer to the notes [A] [B] [C] —at the end of the chapter, in which the characters are uſed.

THE HISTORY OF THE COMMON LAW OF ENGLAND.

CHAP. I.

Concerning the diſtribution of the laws of England *into common law and ſtatute law. And firſt, concerning the ſtatute law, or acts of parliament.*

THE laws of England may aptly enough be divided into two kinds, viz.

Lex ſcripta, the written law;
and
Lex non ſcripta, the unwritten law: (*a*)

For although (as ſhall be ſhewn hereafter) all the laws of this kingdom have ſome monuments or memorials thereof in writing, yet all of them have not their original in writing;

(*a*) Conſtat autem jus noſtrum, quo utimur, aut ſcripto, aut ſine ſcripto; ut apud græcos Τῶν δὲ μὲν ἐγγράφοι, οἱ δὲ ἄγραφοι. Inſt. l. 1. t. 2. ſ. 3. Et non ineleganter in duas ſpecies jus civile diſtributum eſſe videtur; nam origo ejus ab inſtitutis duarum civitatum, Athenarum

for ſome of thoſe laws have obtained their force by immemorial uſage or cuſtom, and ſuch laws are properly called *leges non ſcriptæ*, or unwritten laws or cuſtoms.

Thoſe laws, therefore, that I call *leges ſcriptæ*, or written laws, are ſuch as are uſually called ſtatute laws, or acts of parliament, which are originally reduced into writing before they are enacted, or receive any binding power; every ſuch law being in the firſt inſtance formally drawn up in writing, and made, as it were, a tripartite indenture, between the king, the lords, and the commons; for without the concurrent conſent of all thoſe three parts of the legiſlature, no ſuch law is, or can be made: but the kings of this realm, with the advice and conſent of both houſes of parliament, have power to make new laws, or to alter, repeal, or enforce the old. And this has been done in all ſucceſſion of ages. (A)

Now, ſtatute laws, or acts of parliament, are of two kinds, viz. firſt, thoſe ſtatutes which were made before time of memory; and, ſecondly, thoſe ſtatutes which were made within or ſince time of memory; wherein obſerve, that, according to a juridical account and legal ſignification, time within memory is the time of limitation in a writ of right; which by the ſtatute of Weſtminſter 1. c. 39. (*b*) was ſettled and reduced to the beginning of the reign of king Richard I. or Ex prima coronatione regis Ricardi primi, (*c*) who began his reign the ſixth of July 1189, and

narum ſcilicet et Lacedæmoniorum, fluxiſſe videtur. In his enim civitatibus ita agi ſolitum erat, ut Lacedæmonii quidem ea, quæ pro legibus obſervabant, memoriæ mandarent: Athenienſes vero ea, quæ in legibus ſcripta comprehendiſſent, cuſtodirent. id. ſ. 10. Indeed, under thoſe two comprehenſive heads, all laws have been claſſed, by antient writers. See Ariſtotle's diſtinction of laws, 1 Rhet. c. 3. and the Antigone of Sophocles, v. 459. See alſo Dr. Taylor's Elements of the Civil Law, 24. ſeq. Sir John Forteſcue (who was chancellor to Henry the ſixth) remarks, quod, omnia jura humana, aut ſunt lex naturæ, conſuetudines, vel ſtatuta, quæ et conſtitutiones appellantur. De laud leg. Angl. c. 15.

(*b*) Made at Weſtminſter 25th April, Ann. 3. Edw. 1. Ann. Dom. 1275. See Co Lit. 114. 115. and Barring. Obſ. ſtat. 67. Seq.

(*c*) Time of memory hath been long ago aſcertained by the law to commence from the reign of Richard the firſt, and any cuſtom may be deſtroyed bye vidence of its

and was crowned the third of September following: ſo that whatſoever was before that time, is before time of memory; and what is ſince that time, is, IN A LEGAL SENSE, ſaid to be WITHIN, or ſince the time of memory.

And therefore it is, that thoſe ſtatutes, or acts of parliament, that were made before the beginning of the reign of king Richard the firſt, and have not ſince been repealed, or altered, either by contrary uſage, or by ſubſequent acts of parliament, are now accounted part of the *lex non ſcripta*, being, as it were, incorporated thereinto, and become a part of the common law: and, in truth, ſuch ſtatutes are not now pleadable as acts of parliament, becauſe what is BEFORE time of memory, is ſuppoſed without a beginning, or, at leaſt ſuch a beginning as the law takes notice of, but they obtain their ſtrength by mere immemorial uſage or cuſtom. (*d*)

And, doubtleſs, many of thoſe things that now obtain as common law, had their original by parliamentary acts or conſtitutions, made in writing, by the king, lords, and commons; (*e*) though thoſe acts are now either not extant, or, if extant, were made before time of memory; and the evidence of the truth hereof will eaſily appear, for that in

its non-exiſtence in any part of the long period from his days to the preſent. This rule was adopted, when by the ſtat. of Weſt. 1. c. 39. the reign of Richard the I. was made the time of limitation of a writ of right. But, ſince by the ſtat. 32 Hen. 8. c. 2. this period (in a writ of right) hath been very rationally reduced to ſixty years, it ſeems unaccountable, that the date of legal preſcription, or memory, ſhould ſtill continue to be reckoned from an æra ſo very antiquated. Black. Com. 2 vol. 31. 2 Rol. Abr. 269. pl. 16. and Hawk. Abr. of Co. Lit. 168. but ſee Lit. ſec. 170. and Co. Lit. 113.

(*d*) If found in records or hiſtories, they ought *not* to be reputed as acts of parliament, Com. Dig. 4 v. 334. See Dr. Taylor's Elements of the Civil Law, 241. ſeq. and Summary of the Roman Law 113, 114, 115, 116. But *note* Hale, towards the end of this chapter.

(*e*) The common law and the ſtatute law flow originally, from the ſame fountain, the legiſlature; the ſtatute law being the will of the legiſlature, remaining on record in writing; the common law, nothing elſe but ſtatutes, antiently written, but which have been worn out by time. All our law began by conſent of the legiſlature, and whether it be now law by cuſtom, by uſage, or by writing, it is the ſame thing. By lord chief juſtice Wilmot, in the caſe of Collins verſus Blantern, Wilſ. Par. 2. 348, 351. and ſee the 4th chap. of this hiſtory.

many of thoſe old acts of parliament that were made before time of memory, and are yet extant, we may find many of thoſe laws enacted, which now obtain merely as common law, or the general cuſtom of the realm: and were the reſt of thoſe laws extant, probably the footſteps of the original inſtitution of many more laws that now obtain merely as common law, or cuſtomary laws by immemorial uſage, would appear to have been at firſt ſtatute laws, or acts of parliament.

Thoſe antient acts of parliament, which are ranged under the head of *leges non ſcriptæ*, or cuſtomary laws, as being made before time of memory, are to be conſidered under two periods, viz. firſt, ſuch as were made before the coming in of king William I. (commonly called the conqueror;) or, ſecondly, ſuch as intervened between his coming in, and the beginning of the reign of Richard I. which is the legal limitation of time of memory.

The former ſort of theſe laws are mentioned by our antient hiſtorians, eſpecially by Brompton, and are now collected into one volume by William Lambard, Eſq; (in his *Tractatus de priſcis Anglorum legibus,*) being a collection of the laws of the kings, Ina, Alfred, Edward, Athelſtane, Edmond, Edgar, Ethelred, Canutus, and of Edward the confeſſor; which laſt body of laws, compiled by Edward the confeſſor, as they were more full and perfect than the reſt, and better accommodated to the then ſtate of things, ſo they were ſuch whereof the Engliſh were always very zealous, as being the great rule and ſtandard of their rights and liberties (B); whereof more hereafter. (*f*).

The ſecond ſort are thoſe edicts, acts of parliament, or laws, that were made after the coming in of king William, commonly named the conqueror, and before the beginning of the reign of king Richard I. and more eſpecially are thoſe which follow; whereof I ſhall make but a brief remembrance here, becauſe it will be neceſſary in the ſequel of this diſcourſe, (*g*) (it may be more than once) to reſume the mention of them; and beſides, Mr. Selden, in his book called *Janus Anglorum*, has given a full account of thoſe laws; ſo that at preſent, it will be ſufficient for me, briefly to

(*f*) Chap. 3. and 5. (*g*) Chap. 7.

collect the heads or diviſions of them, under the reigns of thoſe ſeveral kings wherein they were made, viz.

Firſt, the laws of king William I. Theſe conſiſted in a great meaſure of the repetition of the laws of king Edward the confeſſor, and of the enforcing them by his own authority, and the aſſent of parliament, at the requeſt of the Engliſh; and ſome new laws were added by himſelf, with the like aſſent of parliament, relating to military tenures, and the preſervation of the publick peace of the kingdom; all which are mentioned by Mr. Lambart, in the tractate before mentioned, but more fully by Mr. Selden, in his collections and obſervations upon Eadmerus.

Secondly, we find little of new laws after this, till the time of king Henry I. who beſides the confirmation of the laws of the confeſſor, and of king William I. brought in a new volume of laws, which to this day are extant, and called the laws of king Henry I. The entire collection of theſe is entered in the red-book of the Exchequer, and from thence are tranſcribed and publiſhed, by the care of ſir Roger Twiſden, in the latter end of Mr. Lambart's book before mentioned; what the ſucceſs of thoſe laws were, in the time of king Steven, and king Henry II. we ſhall ſee hereafter: (*b*) but they did not much obtain in England, and are now for the moſt part become wholly obſolete, and in effect quite antiquated.

Thirdly, the next conſiderable body of acts of parliament, were thoſe made under the reign of king Henry II. commonly called the conſtitutions of Clarendon; what they were, appears beſt in Hoveden and Matthew Paris, under the years of that king: we have little memory elſe of any conſiderable laws enacted in this king's time, except his aſſizes, and ſuch laws as related to the foreſts; which were afterwards improved under the reign of king Richard I. but of this hereafter, more at large. (*i*)

And this ſhall ſerve for a ſhort inſtance of thoſe ſtatutes, or acts of parliament, that were made before time of memory; whereof as we have no authentical records, but only tranſcripts, either in our antient hiſtorians, or other books and manuſcripts; ſo, they being things done before time

(*b*) Chap. 7. (*i*) Chap. 7.

of memory, obtain at this day, no further than as by uſage and cuſtom they are, as it were, engrafted into the body of the common law, and made a part thereof.

And now I come to thoſe *leges ſcriptæ*, or acts of parliament, which were made ſince or within the time of memory, viz. ſince the beginning of the reign of Richard I. and thoſe I ſhall divide into two general heads, viz. Thoſe we uſually call the old ſtatutes, and, thoſe we uſually call the new, or later, ſtatutes: and, becauſe I would prefix ſome certain time or boundary between them, I ſhall call thoſe the old ſtatutes, which end with the reign of king Edward II. and, thoſe I ſhall call the new, or later, ſtatutes, which begin with the reign of king Edward III. and ſo are derived through a ſucceſſion of kings and queens, down to this day, by a continued and orderly ſeries.

Touching theſe later ſort I ſhall ſay nothing, for they all keep an orderly and regular ſeries of time, and are extant upon record, either in the parliament rolls, or in the ſtatute rolls of king Edward III. and thoſe kings that follow: for excepting ſome few years in the beginning of king Edward III. (i. e. 2, 3, 7, 8 and 9, E. 3.) all the parliament rolls that ever were ſince that time, have been preſerved, and are extant; and, for the moſt part, the petitions upon which the acts were drawn up, or the very acts themſelves.

Now therefore touching the elder acts of parliament, viz. thoſe that were made between the firſt year of the reign of king Richard I. and the laſt year of king Edward II. we have little extant in any authentical hiſtory; and nothing in any authentical record touching acts made in the time of king Richard I. unleſs we take in thoſe conſtitutions and aſſizes mentioned by Hoveden as aforeſaid (*k*).

Neither is there any great evidence, what acts of parliament paſſed in the time of king John, though doubtleſs many there were both in his time, and in the time of king Richard I. But there is no record extant of them, and the Engliſh hiſtories of thoſe times give us but little account of thoſe laws; only Matthew Paris (*l*) gives us an hiſtorical

(*k*) Vide ch. 7.

(*l*) The former part of the hiſtory which goes under the name of Matthew Paris, to the year 1235, is

hiſtorical account of the magna charta, and charta de foreſta, granted by king John at Running Mead, the fifteenth of June, in the ſeventeenth year of his reign.

And it ſeems, that the conceſſion of theſe charters was in a parliamentary way; you may ſee the tranſcripts of both charters verbatim in Matthew Paris, and in the Red book of the Exchequer. There were ſeven pair of theſe charters ſent to ſome of the great monaſteries, under the ſeal of king John, one part whereof, ſent to the abbey of Tewkeſbury, I have ſeen, under the ſeal of that king; the ſubſtance thereof differs ſomething from the magna charta, and charta de foreſta, granted by king Henry III. but not very much, as may appear by comparing them (*m*).

But though theſe charters of king John ſeem to have been paſſed in a kind of parliament, yet it was in a time of great confuſion between that king and his nobles; and therefore they obtained not a full ſettlement till the time of king Henry III. when the ſubſtance of them was enacted by a full and ſolemn parliament.

I therefore come down to the times of thoſe ſucceeding kings, Henry III. Edward I. and Edward II. and the ſtatutes made in the times of thoſe kings, I call the old ſtatutes; partly becauſe many of them were made but in affirmance of the common law; and partly, becauſe the reſt of them, that made a change in the common law, are yet ſo ancient, that they now ſeem to have been, as it were, a part of the common law, eſpecially conſidering the many expoſitions that have been made of them in the ſeveral ſucceſſions of times, whereby as they became the great ſubject of judicial reſolutions and deciſions, ſo thoſe expoſitions and deciſions, together alſo with thoſe old ſtatutes themſelves, are, as it were, incorporated into the very common law, and become a part of it.

is ſuppoſed to have been written by Roger Wendover; but it is generally referred to as the work of Matthew Paris, who died A. D. 1259.

(*m*) Thoſe who are deſirous of receiving further information, of theſe antient charters, may ſee very accurate copies of them, and of other authentic curious inſtruments, with a learned and elegant introductory diſcourſe, in the law tracts which were ſometime ſince publiſhed by Mr. juſtice Blackſtone. See alſo lord Lyt. Hiſt. Hen. II. p. 174. and the eventh chapter of this hiſtory.

In the times of thoſe three kings laſt mentioned, as likewiſe in the times of their predeceſſors, there were doubtleſs many more acts of parliament made, than are now extant of record, or otherwiſe, which might be a means of the change of the common law in the times of thoſe kings from what it was before, though all the records or memorials of thoſe acts of parliament, introducing ſuch a change, are not at this day extant: but of thoſe that are extant, I ſhall give you a brief account, not intending a large or accurate treatiſe touching that matter.

The reign of Henry III. was a troubleſome time, in reſpect of the differences between him and his barons, which were not compoſed till his fifty-firſt year, after the battle of Eveſham (*n*). In his time there were many parliaments, but we have only one ſummons of parliament extant of record in his reign, viz. 49 Henry III. and we have but few of thoſe many acts of parliament that paſſed in his time, viz. the great charter, and charta de foreſta, in the ninth year of his reign, which were doubtleſs paſſed in parliament; the ſtatute (*o*) of Merton (*p*), in the twentieth year of his reign (*q*); the ſtatute of Marlbridge (*r*); in the fifty-

(*n*) Fought on the fourth of Auguſt 1265.

(*o*) It ſeems to be only an ordinance, vide Barr. Obſ. ſtat. 41.

(*p*) It is called the ſtatute of Merton, from the parliament, or rather council, ſitting at the priory of Merton, in Surrey, which belonged to regular canons, according to Dugdale. Though ſome of the priories might have had very large and ſpacious houſes, yet it is not probable that there could have been accommodation for what is now called a parliament, with the intervention of commons; and it ſhould ſeem, from Dugdale's ſhort account of this priory, that it was by no means largely endowed. In all the antient palaces of the kings of England, there was a large room, or hall, for the accomodation of what was then called a parliament, which went by the name of the parliament chamber. There is ſuch an hall, now converted into a barn, at Eltham, in Kent, which is ſaid to have been a palace of king John, though it is now conſidered by eminent antiquaries, as being of a later date; and Barrington has little doubt, but that Weſtminſter Hall, was built for the ſame purpoſe. There was likewiſe ſuch a room in the old palaces of the kings of Scotland; particularly at Linlithgow, and Sterling. Barr. Obſ. ſtat. 41.

(*q*) A. D. 1236.

(*r*) Or Marlebridge, "now called" (as Sir Edward Coke, 2 Inſt. 101. ſays,) "Marleborough, "a town in Wiltſhire, the greateſt "fame whereof is the holding of "this parliament there." "Henricus vero, concilium convocavit

fifty-ſecond year (*s*); and the dictum ſive edictum de Kenelworth (*t*), about the ſame time; and ſome few other old acts.

In the time of king Edward I. there are many more acts of parliament extant than in the time of king Henry III. Yet doubtleſs, in this king's time, there were many more ſtatutes made than are now extant: thoſe that are now extant, are commonly bound together in the old book of Magna Charta. By thoſe ſtatutes, great alterations and amendments were made in the common law; and by thoſe that are now extant, we may reaſonably gueſs, that there were conſiderable alterations and amendments made by thoſe that are not extant, which poſſibly may be the real, though ſudden, means of the great advance and alteration of the laws of England in this king's reign, over what they were in the time of his predeceſſors.

The firſt ſummons of parliament that I remember extant of record in this king's time, is, 23 Edw. 1. though doubtleſs there were many more before this, the records whereof are either loſt or miſlaid: for many parliaments were held by this king, before that time, and many of the acts paſſed in thoſe parliaments are ſtill extant; as, the ſtatutes of Weſtminſter 1, in the 3 of Edw. I. the ſtatutes

" cavit Marlebrigium, quod eſt " pagus celebris comitatus Wil- " ceriæ, qui in eo conventu " primum leges ab ſe latas, et " præſertim Magnæ Chartæ de " concilii ſententia approbandas, " deinde alias condendas curavit, " quæ ad ſtatum et commodum " regni maxime conducerent." See Polyd. Virgil, p. 314, 310.

This town, in our law books, is called a city, and the freemen citizens. See 2 Inſt. 101. who cites 39 E. 3. fo. 15.

Though Marlebridge, where this parliament was holden, is ſuppoſed to be the ſame with the town at preſent called Marleborough, yet there ſeem to be ſome reaſons to doubt it, as the terminations are very different. In Saxton's maps, this town is ſpelt Marlingeſboro. The city of Lincoln, in the old ſtatutes, is however called Nicoll, or Nicholl, which is a greater variation from the modern name. Bar. Obſ. ſtat. 58.

(*s*) A. D. 1267.

(*t*) The dictum de Kenelworth, was an edict or award, between Henry the third, and his barons and others, who had been in arms againſt him: ſo called, becauſe made at Kenelworth caſtle, in Warwickſhire, anno 51 Hen. 3. A. D. 1266. It contained a compoſition of thoſe who had forfeited their eſtates in that rebellion, which compoſition was five years rent of the eſtates forfeited. Vide poſt ch. 7. and ſee the appendix to Ruffhead's ſtatutes.

of

of Glouceſter, 6 Edw. I. The ſtatutes of Weſtminſter 2, and of Winton, 13 Edw. I. the ſtatutes of Weſtminſter 3 and of Quo warranto, 10 Edw. I. and divers others in other years, which I ſhall have occaſion to mention hereafter. *(u)*

In the time of king Edward II. many parliaments were held, and many laws were enacted; but we have few acts of parliament of his reign extant, eſpecially of record.

And now, becauſe I intend to give ſome ſhort account of ſome general obſervations touching parliaments, and of acts of parliament paſſed in the times of thoſe three princes, viz. Henry III. Edw. I. and Edw. II. becauſe they are of greateſt antiquity, and therefore the circumſtances that attended them moſt liable to be worn out by proceſs of time, I will here mention ſome particulars, relating to them, to preſerve their memory, and which may alſo be uſeful to be known in relation to other things.

We are therefore to know, that there are theſe ſeveral kinds of records of things done in parliament, or eſpecially relating thereto, viz.

1. The ſummons to parliament.
2. The rolls of parliament.
3. Bundles of petitions in parliament.
4. The ſtatutes, or acts of parliament themſelves. And,
5. The brevia de parliamento, which for the moſt part were ſuch as iſſued for the wages of knights and burgeſſes; but with theſe I ſhall not meddle.

Firſt, as to the ſummons to parliament.

Theſe ſummons to parliament are not all entred of record in the times of Henry III. and Edward I. none being extant of record in the time of Henry III. but that of 49 Hen. III. and none in the time of Edward I. till the 23 Edw. I. But after that year, they are for the moſt part extant of record, viz. In dorſo claus' rotulorum, in the backſide of the cloſe rolls.

Secondly, as to the rolls of parliament, viz. the entry of the ſeveral petitions, anſwers and tranſactions in parliament. Thoſe are generally and ſucceſſively extant of re-

(u) Vide chap. 7.

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cord in the Tower, from 4 Edw. III. downward, till the end of the reign of Edw. IV. excepting only thoſe parliaments that intervened between the firſt and the fourth, and between the ſixth and the eleventh of Edward III.

But of thoſe rolls in the times of Henry III. and Edward I. and Edward II. many are loſt and few extant; alſo, of the time of Henry III. I have not ſeen any parliament roll; and all that I ever ſaw of the time of Eward I. was one roll of parliament in the receipt of the Exchequer of 18 Edw. I. and thoſe proceedings and remembrances which are in the Liber placitor' parliamenti in the Tower, begining, as I remember, with the twentieth year of Edward I. and ending with the parliament of Carliſle, 35 Edw. I. and not continued between thoſe years with any conſtant ſeries; but including ſome remembrances of ſome parliaments in the time of Edward I. and others in the time of Edward II.

In the time of Edward II. beſides the rotulus ordinationum of the lords ordoners, about 7 Edw. II. we have little more than the parliament rolls of 7 & 8 Edw. II. and what others are interſperſed in the parliament book of Edward I. above-mentioned, and, as I remember, ſome ſhort remembrances of things done in parliament in the 19 Edw. III.

Thirdly, as to the bundles of petitions in parliament. They were for the moſt part petitions of private perſons, and are commonly endorſed with remiſſions to the ſeveral courts where they were properly determinable. There are many of thoſe bundles of petitions, ſome in the times of Edward I. and Edward II. and more in the times of Edward III. and the kings that ſucceeded him.

Fourthly, the ſtatutes, or acts of parliament themſelves. Theſe ſeem, as if in the time of Edward I. they were drawn up into the form of a law in the firſt inſtance, and ſo aſſented to by both houſes, and the king, as may appear by the very obſervation of the contexture and fabrick of the ſtatutes of thoſe times. But from near the beginning of the reign of Edward III. till very near the end of Henry VI. they were not in the firſt inſtance drawn up in the form of acts of paliament; but the petition and the anſwer were entred in the parliament rolls, and out of both,

by

by advice of the judges, and others of the king's council, the act was drawn up conformable to the petition and anſwer, and the act itſelf for the moſt part entred in a roll, called the ſtatute roll, and the tenor thereof affixed to proclamation writs, directed to the ſeveral ſheriffs to proclaim it as a law in their reſpective counties. [C]

But becauſe ſometimes difficulties and troubles aroſe, by this extracting of the ſtatute out of the petition and anſwer; about the latter end of Henry VI. and beginning of Edward IV. they took a courſe to reduce them, even in the firſt inſtance, into the full and complete form of acts of parliament, which was proſecuted (or entred) commonly in this form: item quædam petitio exhibita fuit in hoc parliamento formam actus in ſe continens, &c. and abating that ſtile, the method ſtill continues much the ſame; namely, that the entire act is drawn up in form, and ſo comes to the king for his aſſent.

The ancient method of paſſing acts of parliament being thus declared, I ſhall now give an account touching thoſe acts of parliament that are at this day extant of the times of Henry III. Edward I. and Edward II. and they are of two ſorts, viz. ſome of them are extant of record; others are extant in ancient books and memorials, but none of record. And thoſe which are extant of record, are either recorded in the proper and natural roll, viz. the ſtatute roll; or they are entred in ſome other roll, eſpecially in the cloſe rolls and patent rolls, or in both. Thoſe that are extant, but not of record, are ſuch as though they have no record extant of them, but poſſibly the ſame is loſt; yet they are preſerved in ancient books and monuments, and in all times have had the reputation and authority of acts of parliament.

For an act of parliament made within time of memory, loſes not its being ſo, becauſe not extant of record, eſpecially if it be a general act of parliament. For of general acts of parliament, the courts of common law are to take notice without pleading of them; and ſuch acts ſhall never be put to be tried by the record, upon an iſſue of nul tiel Record, but it ſhall be tried by the court, who, if there be any difficulty or uncertainty touching it, or the right of pleading of it, are to uſe for their information ancient copies,

copies, tranſcripts, books, pleadings and memorials to inform themſelves, but not to admit the ſame to be put in iſſue by a plea of nul tiel Record [D].

For, as ſhall be ſhewn hereafter, there are very many old ſtatutes which are admitted and obtain as ſuch, though there be no record at this day extant thereof, nor yet any other written evidence of the ſame, but what is in a manner only traditional, as namely, ancient and modern books of pleadings, and the common received opinion and reputation, and the approbation of the judges learned in the laws: for the judges and courts of juſtice are, *ex Officio*, bound to take notice of public acts of parliament, and whether they are truly pleaded or not, and therefore they are the triers of them. But it is otherwiſe of *private* acts of parliament, for they may be put in iſſue, and tried by the record upon nul tiel Record pleaded, unleſs they are produced exemplified, as was done in the princes caſe in my lord Coke's 8th Rep. and therefore the averment of nul tiel Record was refuſed in that caſe (*w*).

The old ſtatutes or acts of parliament that are of record, as is before ſaid, are entred either upon the proper ſtatute roll, or ſome other roll in Chancery.

The firſt ſtatute roll which we have, is in the Tower, and begins with Magna Charta, and ends with Edward III. and is called Magnus Rotulus Statutor'. There are five other ſtatute rolls in that office, of the times of Richard II. Henry IV. Henry V. Henry VI. and Edward IV.

I ſhall now give a ſcheme of thoſe ancient ſtatutes of the times of Henry III. Edward I. and Edward II. that are recorded in the firſt of thoſe rolls or elſewhere, to the beſt

(*w*) The judges ought to take notice of a GENERAL law, for they are to determine whether it be a ſtatute or not. *Co. Lit.* 98. *b. Dy.* 93. 1 *Lev.* 296. And therefore, a man can NOT plead NUL TIEL RECORD, to it. 8 *Co.* 28. *a.* So it ſhall *not* be proved by a journal. *Hob.* 110. or alledged, that the aſſent of the Commons was conditional. *Mo.* 824. But a ſtatute, which concerns only a particular ſpecies, a particular thing, or, a particular perſon, is deemed a PRIVATE ACT, of which the judges are not bound to take any notice, unleſs it be SPECIALLY pleaded. 4 *Co.* 76. *a.* A ſtatute which relates to a particular place, or town, will be conſidered as a PRIVATE law, though it may concern ALL perſons. 4 *Co.* 76. *b.* Skin. 350. And in a GENERAL act, there may be a PRIVATE clauſe. 10 *Co.* 57. *b.*

of

of my remembrance, and according to thoſe memorials I have long had by me, viz.

Magna Charta. Magno Rot. Stat. membr. 40. & Rot. Cartar. 28 E. 1. membr. 16.

Charta de Foreſta. Mag. Rot. Stat. membr. 19. & Rot. Cartar. 28 E. 1. membr. 26.

Stat. de Glouceſtre. Mag. Rot. Stat. membr. 47.

Weſtm. 2. Rot. Mag. Stat. membr. 47.

Weſtm. 3. Rot. Clauſo, 18 E. 1. membr. 6. Dorſo.

Winton. Rot. Mag. Stat. membr. 41. Rot. Clauſo, 8 E. 3. membr. 6. Dorſo. Pars. 2 Rot. Clauſo, 5 R. 2. membr. 13. Rot. Paten. 25 E. 1. membr. 13.

De Mercatoribus. Mag. Rot. Stat. membr. 47. In Dorſo.

De Religioſis. Mag. Rot. Stat. membr. 47.

Articuli Cleri. Mag. Rot. Stat. membr. 34. Dorſo 2 Pars. Pat. E. 1. 2. membr. 34. 2. Pars. Pat. 2. E. 3. membr. 15.

De hiis qui ponendi ſunt in Aſſiſis. Mag. Rot. Stat. membr. 41.

De Finibus levatis. Mag. Rot. Stat. membr. 37.

De defenſione Juris liberi Parliam. Lib. Parl. E. 1. fo. 32.

Stat. Eborum. Mag. Rot. Stat. membr. 32.

De conjunctis infeofatis. Mag. Rot. Stat. membr. 34.

De Eſcaetoribus. Mag. Rot. Stat. membr. 35. Dorſo, & Rot. Clauſ. 29 E. 1. membr. 14. Dorſo.

Stat. de Lincolne. Mag. Rot. Stat. membr. 32.

Stat. de Priſcis. Rot. Mag. Stat. membr. 33. In Schedula de libertatibus perquirendis, vel Rot. Clauſ. 27 E. 1 membr. 24.

Stat. de Acton Burnel. Rot. Mag. Stat. membr. 46. Dorſo, & Rot. Clauſ. 11. E. 1. membr. 2.

Juramentum Vicecomit. Rot. Mag. Stat. membr. 34. Dorſo, & Rot. Clauſ. 5 E. 2. membr. 23.

Articuli Stat. Glouceſtriæ. Rot. Clauſ. 2 E. 2. Pars. 2. membr. 8.

De Piſtoribus & Braciatoribus. 2 Pars, Clauſ. vel Pat. 2 R. 2. membr. 29.

De aſportatis Religioſor. Mag. Rot. Stat. membr. 33.

Weſtm. 4. De Vicecomitibus & Viridi cæra. Rot. Mag. Stat. membr. 33. In Dorſo.

Con-

Confirmationes Chartarum. Mag. Rot. Stat. membr. 28.

De Terris Templariorum. Mag. Rot. Stat. membr. 31. in Dorſo, & Clauſ. 17 E. 2. membr. 4.

Litera patens ſuper priſis bonorum Cleri. Rot. Mag. Stat. membr. 33. In Dorſo.

De Forma mittendi extractas ad Scaccar. Rot. Mag. Stat. membr. 36. & membr. 30. In Dorſo.

Statutum de Scaccar. Mag. Rot. Stat.

Statutum de Rutland. Rot. Clauſ. 12 E. 1.

Ordinatio Foreſtæ. Mag. Rot. Stat. membr. 30. & Rot. Clauſ. 17 E 2. Pars 2. membr. 3.

According to a ſtrict inquiry made about 30 years ſince, theſe were all the old ſtatutes of the times of Henry III. Edward I. and Edward II. that were then to be found of record; what other ſtatutes have been found ſince, I know not.

The ordinance called Butler's, for the heir to puniſh waſte in the life of the anceſtor, though it be of record in the parliament book of Edward I. yet it never was a ſtatute, nor never ſo received, but only ſome conſtitution of the king's council or lords in parliament, and which never obtained the ſtrength or force of an act of parliament.

Now thoſe ſtatutes that enſue, though moſt of them are unqueſtionable acts of parliament, yet are NOT of record that I know of, but only their memorials preſerved in ancient printed and manuſcript books of ſtatutes; yet they are at this day for the moſt part generally accepted and taken as acts of parliament, though ſome of them are now antiquated and of little uſe, viz.

The ſtatutes of Merton, Marlbridge, Weſtm. 1. Explanatio Statuti Glouceſtriæ, De Champertio, De viſu Frankplegii, De pane & Cerviſia, Articuli Inquiſitionis ſuper Stat. de Winton, Circumſpecte agatis, De diſtrictione Scaccarii, De conſpirationibus, De vocatis and Warrant. Statut. de Carliol, De prerogativa Regis, De modo faciendi Homag. De Wardis & Releivis Dies Communis in Banco. Stat. de Bigamis, Dies communes in Banco in caſu conſimili. Stat. Hiberniæ, De quo Warranto, De Eſſoin calumpniand. Judicium colliſtrigii, De Frangentibus Priſonar'. De male-

factoribus

factoribus in Parcis, De Conſultationibus, De Officio Coronatoris, De Protectionibus, Sententia lata ſuper Chartas, Modus levandi Fines. Statut. de Gavelet, De Militibus, De Vaſto, De anno Biſſextili, De appellatis, De Extenta Manerii, Compoſitio Menſearum vel Computatio Menſarum. Stat. de Quo Warranto, Ordinatio De Inquiſitionibus, Ordinatio De Foreſta, De admenſura Terre, De dimiſſione Denarior. Stat. De Quo Warranto novum, Ne Rector proſternat arbores in Cæmeterio, Conſuetudines & Aſſiſa de Foreſta, Compoſitio de Ponderibus, De Tallagio, De viſu Terræ & ſervitio Regis, Compoſitio ulnarum & particarum, De Terris amortizandis, Dictum De Kenelworth, &c.

From whence we may collect theſe two obſervations, viz.

Firſt, that although the record itſelf be not extant, yet general ſtatutes made within time of memory, namely, ſince 1 Richardi primi, do not loſe their ſtrength, if any authentical memorials thereof are in books, and ſeconded with a general received tradition atteſting and approving the ſame.

Secondly, that many records, even of acts of parliament, have in long proceſs of time been loſt, and poſſibly the things themſelves forgotten at this day, which yet in or near the times wherein they were made, might cauſe many of thoſe authoritative alterations in ſome things touching the proceedings and deciſions in law: the original cauſe of which change being otherwiſe at this day hid and unknown to us; and indeed, hiſtories and annals give us an account of the ſuffrages of many parliaments, whereof we at this time have none, or few footſteps extant in records or acts of parliament. The inſtance of the great parliament at Oxford, about the fortieth of Henry III. may, among many others of like nature, be a concurrent evidence of this: for though we have mention made in our hiſtories of many conſtitutions made in the ſaid parliament at Oxford, and which occaſioned much trouble in the kingdom, yet we have no monuments of RECORD concerning that parliament, or what thoſe conſtitutions were.

And

And thus much ſhall ſerve touching thoſe old ſtatutes or *leges ſcriptæ*, or acts of parliament made in the times of thoſe three kings, Henry III. Edward I. and Edward II. Thoſe that follow in the times of Edward III. and the ſucceeding kings, are drawn down in a continued ſeries of time, and are extant of record in the parliament rolls, and in the ſtatute rolls, without any remarkable omiſſion, and therefore I ſhall ſay nothing of them.

ADDITIONAL NOTES

TO THE

FIRST CHAPTER.

NOTE [A] p. 2.

SIR Edward Coke, in treating of the high court of parliament, ſays, "there is no act of parliament, but muſt have "the conſent of the lords, the commons, and the royal aſſent of "the king; and as it appeareth by records (*a*) and our books, "whatſoever paſſeth in parliament by this threefold conſent, "hath the force of an act of parliament." (*b*)

If there be the conſent of one or two of them, it is only an ordinance; for the difference between an act of parliament and an ordinance is, "for that the ordinance wanteth the threefold "conſent, and is ordained by one or two of them." (*c*) Elſynge "ſtates the diſtinction thus: what begun in the commons was "only termed a petition (for they had no power to ordain;) "and what begun in the lords was ſtyled an ordinance. *Actus* "*Parliamenti* was an act made by the lords and commons; and "it became *Statutum* when it received the king's conſent." This paſſage is omitted in the late edition of Elſynge; (1768, 12mo.) for himſelf eraſed it, from the MS. from which that edition is printed. Vide *Barr. Obſ. Stat.* 41.

If an act *appears* to be paſſed, without the aſſent of the commons, it *ſhall* be void. Mo. 824. Or, without the aſſent of the lords, or, of the king. Pl. Com. 79. H. Parl. 32. So, if it be by the aſſent of the king, the lords *ſpiritual* ONLY, and the commons, it is but an *ordinance*, and no act of parliament.

(*a*) vide 14 R. 2. nu. 15. and 13 H. 4. nu. 25.

(*b*) 4 Inſt. 25 cites, 4 H. 7 18. B. p. touts les juſtices. 7 H. 7. 14, 16. 11 H. 7. 27. a. Brook prerogative, 134. Forteſcue ſo. 20. cap. 18. Dier 1 Mar 91. vide alſo 2 Inſt. 157. 8 Co. 20. the prince's caſe. Pl. com. 79. a. Ha. parl. 31.

(*c*) 4 Inſt. 25. cites, Rot. parl. 25 E 3. nu. 16, &c. 39 E. 3. 12. 22 E. 3. 3. 8 H. 6. cap. 29. Dier 4 Mar. 144. 39 E. 3. 7. Thorp male erravit. Rot. Parl. 37 E. 3. nu. 39. 1 R. 2. nu. 36. diverſity between acts of parliament and ordinances. 2 R. 2. Stat. 2. nu. 28.

ment. Or, by the king, the lords *temporal*, and commons. 4 Inſt. 25. But it is not neceſſary, that *any* of the lords ſpiritual *aſſent*; if there be a MAJORITY of the lords ASSEMBLED in parliament. Seld. 3 v. 2 p. 1528. So, if all the ſpiritual lords aſſent *conditionally*; for, the condition is void. 4 Inſt. 35. Or, if the ſpiritual lords are abſent. 3 Ruſh. 1344. So it is *not material*, that the aſſent of the king, lords and commons, be *particularly* expreſſed: for PER ASSENSUM PARLIAMENTI, comprehends the aſſent of ALL. Jon. 104. So, if by the roll it appears, that the bill was ſent to the lords, by the commons, *with a proviſo annexed*, and no proviſo is extant upon the record, yet it ſhall be a good ſtatute. Hob. 110. And, if the journal of parliament be variant from the record, it does not prejudice, for *that* is no record. Hob. 110, 111. So it is *not* material in what *form* it is expreſſed: for it may be in the form of a charter. Co. Lit. 98. 8 Co. 18, 19. Or, by way of a GRANT, by the king in parliament. Co. Lit. 98.—And therefore, if the king grants PER CONSILIUM FIDELIUM SUBDITORUM, and it has always had the reputation of an act of parliament, it is SUFFICIENT. 8 Co. 20. a. the prince's caſe. Jon. 103. So, if the act be penned, DE CONCILIO PRÆLATORUM, COMITUM, BARONUM ET ALIORUM DE REGNO NOSTRO STATUIMUS, &c. Vide 8 Co. 20. So, if it be *certified* as an act of parliament by the chancellor, when *nul tiel record* is pleaded, and a *certiorari* goes to him to certify; though the royal aſſent be not expreſſed. 3 Keb. 587.

GENERAL acts are always INROLLED by the clerk of the parliament, and delivered to the *Chancery*; which inrolment in *Chancery*, makes the ORIGINAL record. Hob. 109.

But PRIVATE acts are *not* inrolled, without the ſpecial ſuit of the party; the original bill, with the aſſent of the lords and commons and royal aſſent indorſed and filed, and labelled with the other bills to which the great ſeal is annexed, which remain with the clerk of parliament, is the original record. Hob. 109.

NOTE [B] p. 4.

As to the laws of Edward the confeſſor, the authenticity of thoſe in print is controverted by Dr. Hickes. (*a*) Mr. Lambard, who publiſhed the firſt edition of the Anglo Saxon Laws, informs his reader, that thoſe called Edward the confeſſor's were printed from two manuſcripts, and that though one of them was very antient, yet the other was not ſo old (*b*) The moſt com-

(*a*) Vide Hic. Theſ. Ling. ſeptem. diſſert. epiſt. 95. (*b*) Lamb Archa. 124. a.

mendable circumſtance of Edward the confeſſor's government, was his attention to the adminiſtration of juſtice, and his compiling, for that purpoſe, a body of laws, which he collected from the laws of Ethelbert, Ina, and Alfred. This compilation, though now loſt (for the laws that paſs under Edward's name were compoſed afterwards) were long the objects of affection to the Engliſh nation. (*c*)

What were, in reality, the laws of Edward the confeſſor is much diſputed by antiquarians, and our ignorance of them ſeems one of the greateſt defects in Engliſh hiſtory. The collection of laws in Wilkins, which paſs under the name of Edward, are plainly a poſterior and an ignorant compilation. Thoſe to be found in Ingulf are genuine; but ſo imperfect, and contain ſo few clauſes favourable to the ſubject, that we ſee no great reaſon for contending for them ſo vehemently. It is probable, that the Engliſh meant the common law, as it prevailed during the reign of Edward; which we may conjecture to have been more indulgent to liberty than the Norman inſtitutions. The moſt material articles of it were comprehended in Magna Charta. *Hume.*

NOTE [C] p. 12.

Many acts however, though undoubtedly valid, were *not* entered on the *ſtatute roll*: for if the bill did not demand NOVEL LEY, that is, if the proviſion required would ſtand with the laws then in force, and did not tend to alter any ſtatute then in being; in ſuch caſe the law was compleat by the royal aſſent on the parliament roll, without any entry on the ſtatute roll: And ſuch bills were uſually termed ORDINANCES, being ſuch as might at any time be amended by the parliament without any ſtatute; for one ſtatute could not be altered but by another: and this diſtinction is clearly expreſſed in the rolls hereunder cited, viz.

Rot. Parl. 37 E. 3. nu. 38. "As the things granted in this "parliament were *new*, and not known before then, the king "aſked the commons, if they would have the things ſo granted "by way of ORDINANCE, or, ſtatute? and they anſwered "that, it was good to have them by way of ORDINANCE, and "not by ſtatute, to the end that if any thing required amend-"ment, it might be amended at the next parliament." [N. B. Among the ordinances on this roll, is one for regulating apparel; and it is obſervable that, "the chancellor, by "the king's command, charged the commons, at their return "into the country, *to ſhew and publiſh* the ORDINANCE of appa-

(*c*) Spelm. in verbo, Balliva.

"rel,

" rel, to the end that every one might wear apparel agreeable " thereto." Therefore, this ſerves to explain in what manner thoſe acts which were *not* entered on the *ſtatute roll*, and conſequently *not* proclaimed by the ſheriffs, were made known to the people.—But, to proceed.]—It may be collected from this record, that though the law demanded was *new*, yet it was ſuch as might ſtand with the old laws, and did *not* alter any ſtatute then in force, it might paſs indifferently by way of ordinance, or, ſtatute; whereas if it *changed* any *old law* it MUST have been BY STATUTE; as is farther evident from the following record. " Rot. Parl. 22 E. 3. nu. 30." " The king by the aſſent of the " lords, made anſwer that, laws and proceſs *heretofore uſed* could " *not* be *changed*, without making NEW STATUTES." But after all, it muſt be confeſſed that whatever the right was, yet ſo *irregular* was the *practice*, that a great number of printed acts, as Prynne obſerves, refute this diſtinction. In ſhort, acts are, by the legiſlature, frequently called ORDINANCES; and ordinances are as frequently ſtiled acts of parliament or ſtatutes: and ſometimes the words, *act* and *ordinance* are coupled together. Therefore perhaps the only difference, if any, between them is, that bills entered with the royal aſſent on the parliament roll, were called ORDINANCES, and when entered on the ſtatute roll, were ſtiled STATUTES. In ſhort, however they may be verbally diſtinguiſhed, their operation was the ſame. Vide Ruffh. pref. to ſtat. xiii. and Comyns's Dig. 4 v. 305.

NOTE [D] p. 13.

A general or publick act of parliament, is an univerſal rule, that regards the whole community. Blac. Com. 1 v. 86.

All acts which concern the king, who is the head of the common wealth, *are general laws*, of which the judges will take notice, without pleading. 8 Co. 28. 4 Co. 13, 77. So, if they concern the queen; for ſhe is the king's wife. Or, the prince; for he is the eldeſt ſon of the king, and heir apparent to the crown. 8 Co. 28. The ſt. 2 R. 2. 5. *de ſcandalis magnatum* is a general law; for it touches the prelates, nobles, and great officers, who are of the king's counſel. 4 Co. 13. So the St. 35 H. 8. which concerns the capacity of the queen. 8 Co. 28. Pl. Com. 231. a. So the ſt. 11 Ed. 3. which makes the prince, duke of Cornwall. 8 Co. 28. So, a ſtatute which concerns the whole SPIRITUALITY, will be a general law; as, 21 H. 8. 13. 4 Co. 76. a. 1 Brownl. 208. So, 13 El. 10. and 18 El. 11. 4 Co. 76. a. 120. b. 1 Brownl. 208. So, a ſtatute, which concerns

all officers in general; as, the St. W. 1. 26. that no ſheriff, or other miniſter take reward, &c. 4 Co. 76. a. So, a ſtatute, which concerns trade in general. 4 Co. 76. b. So the St. 1 Jac. 22. which relates to ſhoemakers, &c. is a general law. Lut. 1410. So the St. 2 Ph. & M. 11. which relates to woollen weavers, &c. for the penalties are given to the king. Skin. 429. So, a ſtatute, which concerns all the lords generally, as, the ſt. Marl. 3. 4 Co. 76. So, if it concerns all perſons generally, though it be but a ſpecial or particular thing; as, a ſtatute which concerns appeals, or aſſiſes, or other particular action; *elegit*, attaint, &c. the ſt. Mert. 6. and 4 H. 7. 17. concerning wards. 4 Co. 76. The ſt. W. 2. [vide W. 1. c. 20] *de malefactoribus in parcis*; and *charta de foreſta*. The ſt. 22 Ed. 4. 7. and 35 H. 8. 17. of woods in foreſts, chaſes, &c. 8 Co. 138. b.

But now, when any particular law paſſes, which the legiſlature mean ſhould operate as a public act; it is, in general, enacted, that the act ſhall be deemed a public act, and be judicially taken notice of as ſuch, by all perſons whatſoever, without ſpecially pleading the ſame. See Co. Lit. 99. a. edit. Hargrave.

Mich. 26 Geo. 2. Adcock verſ. Gill. In an action for exerciſing the trade of a worſted weaver in the city of Norwich, contrary to the 13th and 14th Ch. 2. there was a ſpecial verdict.

Deniſon J. deſired, that it might be conſidered, whether the act was not a private ſtatute, of which, as it was NOT in the preſent caſe pleaded, the judges could not take notice, and he mentioned the caſe of Rex v. Wild, 2 Keb. 686, in which it was agreed by the court, that this ſtatute is a private ſtatute.

It was admitted, that the objection of Mr. J. Deniſon, as ſupported by the caſe of Rex v. Wild, was concluſive, and there-judgment for defendant.

CHAP.

CHAP. II.

Concerning the lex non ſcripta, i. e. *the common or municipal law of this kingdom.* [*See the third ſection of the introduction to Mr. Juſtice* Blackſtone's *Commentaries.*]

IN the former chapter I have given you a ſhort account of that part of the laws of England which is called *lex ſcripta*, namely, ſtatutes or acts of parliament, which in their original formation are reduced into writing, and are ſo preſerved in their original form, and in the ſame ſtile and words wherein they were firſt made: I now come to that part of our laws called *lex* NON *ſcripta*, under which I include not only general cuſtoms, or the common law properly ſo called, but even thoſe more *particular* laws and cuſtoms applicable to certain courts and perſons, whereof more hereafter.

And when I call thoſe parts of our laws *leges non ſcriptæ*, I do not mean as if all thoſe laws were only oral, or communicated from the former ages to the later, merely by word. For all thoſe laws have their ſeveral monuments in writing, whereby they are transferred from one age to another, and without which they would ſoon loſe all kind of certainty: for as the civil and canon laws have their reſponſa prudentum conſilia & deciſiones, i. e. their canons, decrees, and decretal determinations extant in writing; ſo thoſe laws of England which are not comprized under the title of acts of parliament, are for the moſt part extant in records of pleas, proceedings and judgments, in books of reports, and judicial deciſions, in tractates of learned men's arguments and opinions, preſerved from ancient times, and ſtill extant in writing.

But I therefore ſtile thoſe parts of the law *leges non ſcriptæ*, becauſe their authoritative and original inſtitutions are not ſet down in writing in that manner, or with that authority that acts of parliament are; but they are grown into uſe, and have acquired their binding power and the force of laws BY A LONG AND IMMEMORIAL USAGE, *and by the*

ſtrength of cuſtom and reception in this kingdom (*a*). The matters, indeed, and the ſubſtance of thoſe laws, are in writing, but the formal and obliging force and power of them grows by long cuſtom and uſe, as will fully appear in the enſuing diſcourſe.

The municipal laws of this kingdom, which I thus call *leges non ſcriptæ*, are of a vaſt extent, and indeed include in their generality all thoſe ſeveral laws which are allowed, as the rule and direction of juſtice and judicial proceedings, and which are applicable to all thoſe various ſubjects, about which juſtice is converſant. I ſhall, for more order, and the better to guide my reader, diſtinguiſh them into two kinds, viz.

Firſt, the common law, as it is taken in its proper and uſual acceptation.

Secondly, thoſe particular laws applicable to particular ſubjects, matters, or courts.

1. Touching the former, viz. the common law in its uſual and proper acceptation. This is that law by which proceedings and determinations in the king's ordinary courts of juſtice are directed and guided. This directs the courſe of diſcents of lands, and the kinds; the natures, and the extents and qualifications of eſtates; therein alſo the manner, forms, ceremonies and ſolemnities of transferring eſtates from one to another; the rules of ſettling, acquiring, and transferring of properties; the forms, ſolemnities, and obligation of contracts; the rules and directions for the expoſition of wills, deeds and acts of parliament. The proceſs, proceedings, judgments and executions of the king's ordinary courts of juſtice; the limits, bounds and extents of courts, and their juriſdictions. The ſeveral kinds of temporal offences, and puniſhments at common law; and the manner of the application of the ſeveral kinds of puniſhments, and infinite more particulars which extend themſelves as large, as the many exigencies in the diſtribution of the king's ordinary juſtice requires.

(*a*) The Roman law, *de jure non ſcripto*, ſays, *ſine ſcripto jus venit*, QUOD USUS APPROBAVIT; *nam diuturni mores, conſenſu utentium comprobati, legem imitantur.* Inſt. l. 1. t. 2. ſ. 9.

And

And beſides theſe more common and ordinary matters to which the common law extends, it likewiſe includes the laws applicable to divers matters of very great moment; and though by reaſon of that application, the ſaid common law aſſumes divers denominations, yet they are but branches and parts of it; like as the ſame ocean, though it many times receives a different name from the province, ſhire, iſland or country to which it is contiguous, yet theſe are but parts of the ſame ocean.

Thus the common law includes lex prerogativa (*b*), as it is applied with certain rules to that great buſineſs of the king's prerogative; ſo it is called *lex foreſtæ*, as it is applied under its ſpecial and proper rules to the buſineſs of foreſts; ſo it is called *lex mercatoria* (*c*), as it is applied under its proper rules to the buſineſs of trade and commerce; and many more inſtances of like nature may be given: nay, the various and particular cuſtoms of cities, towns and manors are thus far parts of the common law (*d*), as they are applicable to thoſe particular places, which will appear from theſe obſervations, viz.

Firſt, the common law does determine what of thoſe cuſtoms are good and reaſonable, and what are unreaſonable and void. Secondly, the common law gives to thoſe cuſtoms, that it adjudges reaſonable, the force and efficacy of their obligation. Thirdly, the common law determines what is that continuance of time that is ſufficient to make ſuch a cuſtom. Fourthly, the common law does interpoſe and authoritatively decide the expoſition, limits and extenſion of ſuch cuſtoms.

This common law, though the uſage, practice and deciſions of the king's courts of juſtice may expound and evidence it, and be of great uſe to illuſtrate and explain it; yet it cannot be authoritatively altered or changed but by act of parliament. But of this common law, and the reaſon of its denomination, more at large hereafter.

Now, ſecondly, as to thoſe particular laws I before mentioned, which are applicable to particular matters, ſubjects or courts: theſe make up the ſecond branch of the laws of

(*b*) Vide Blac. Com. l. 1. c. 7.

(*c*) 8 Rep. 126. Cro. Car. 347. It is a maxim of law, that "cuilibet in ſua arte credendum eſt."

(*d*) See Blac. Com. 1 v. 74. ſeq.

England,

England, which I include under the general term of *leges non ſcriptæ*, and by thoſe particular laws I mean the laws eccleſiaſtical, and the civil law, ſo far forth as they are admitted in certain courts, and certain matters allowed to the deciſion of thoſe courts, whereof hereafter.

It is true that thoſe civil and eccleſiaſtical laws are indeed written laws; the civil law being contained in their pandects, and the inſtitutions of Juſtinian, &c. (their imperial conſtitutions or codes anſwering to our *leges ſcriptæ*, or ſtatutes.) And the canon or eccleſiaſtical laws contained for the moſt part in the canons and conſtitutions of councils and popes, collected in their Decretum Gratiani, and the decretal epiſtles of popes, which make up the body of their corpus juris canonici, together with huge volumes of councils and expoſitions, deciſions, and tractates of learned civilians and canoniſts, relating to both laws; ſo that it may ſeem at firſt view very improper to rank theſe under the branch of *leges non ſcriptæ*, or unwritten laws.

But I have for the following reaſon ranged theſe laws among the unwritten laws of England, viz. becauſe it is moſt plain, that neither the canon law nor the civil law have any obligation as laws within this kingdom, upon any account that the popes or emperors made thoſe laws, canons, reſcripts or determinations, or becauſe Juſtinian compiled their corpus juris civilis, and by his edicts confirmed and publiſhed the ſame as authentical, or becauſe this or that council or pope made thoſe or theſe canons or decrees, or becauſe Gratian, or Gregory, or Boniface, or Clement, did, as much as in them lay, authenticate this or that body of canons or conſtitutions; for the king of England does not recognize any foreign authority as ſuperior or equal to him in this kingdom, neither do any laws of the pope or emperor, as they are ſuch, bind here: but all the ſtrength that either the papal or imperial laws have obtained in this kingdom, is only becauſe they have been received and admitted, either by the conſent of parliament, and ſo are part of the ſtatute laws of the kingdom, or elſe by immemorial uſage and cuſtom in ſome particular caſes and courts, and no otherwiſe; and therefore ſo far as ſuch laws are received and allowed of here, ſo far they obtain and no farther; and the authority and force they have here is not founded on, or derived from themſelves; for ſo they bind no more

with

with us than our laws bind in Rome or Italy. But their authority is founded merely on their being admitted and received by us, which alone gives them their authoritative eſſence, and qualifies their obligation [A].

And hence it is, that even in thoſe courts where the uſe of thoſe laws is indulged according to that reception which has been allowed them, if they exceed the bounds of that reception, by extending themſelves to other matters than has been allowed them; or if thoſe courts proceed according to that law, when it is controuled by the common law of the kingdom: the common law does and may prohibit and puniſh them: and it will not be a ſufficient anſwer, for them to tell the king's courts, that Juſtinian or pope Gregory have decreed otherwiſe (*e*). For we are not bound by their decrees further, or otherwiſe, than as the kingdom here has, as it were, tranſpoſed the ſame into the common and municipal laws of the realm, either by admiſſion of, or by enacting the ſame, which is that alone which can make them of any force in England [B]. I need not give particular inſtances herein; the truth thereof is plain and evident, and we need go no further than the ſtatutes of 24 H. 8. c. 12. 25 H. 8. c. 19, 20, 21. and the learned notes of Selden upon Fleta, and the records there cited; nor ſhall I ſpend much time touching the uſe of thoſe laws in the ſeveral courts in this kingdom: but will only briefly mention ſome few things concerning them.

(*e*) For which reaſon, it becomes highly neceſſary for every civilian and canoniſt, that would act with ſafety as a judge, or with prudence and reputation as an advocate, to know in what caſes, and how far, the Engliſh laws have given ſanction to the Roman; in what points the latter are rejected; and where they are both ſo intermixed and blended together, as to form certain ſupplemental parts of the common law of England, diſtinguiſhed by the titles of the king's maritime, the king's military, and the king's eccleſiaſtical law. The propriety of which enquiry the univerſity of Oxford has for more than a century ſo thoroughly ſeen, that in her ſtatutes (tit. vii. ſect. 2.) ſhe appoints, that one of the three queſtions to be annually diſcuſſed at the act by the juriſt-inceptors ſhall relate to the common law; ſubjoining this reaſon, "quia "juris civilis ſtudioſos decet haud "imperitos eſſe juris municipalis, "et differentias exteri patriique "juris notas habere." And the ſtatutes of the univerſity of Cambridge (ſtat. Eliz. R. c. 14 Cowell Inſtitut. in proëmio.) ſpeak expreſsly to the ſame effect. Blac. Com. 1 v. 15. Seld. in Fletam. 5 Rep. Caudrey's caſe, paſſim. 2 Inſt. 599.

There

There are three courts of note, wherein the civil, and in one of them the canon or eccleſiaſtical law, has been with certain reſtrictions allowed in this kingdom, viz. Firſt, the courts eccleſiaſtical, of the biſhops and their derivative officers. Secondly, the admiralty court. Thirdly, the curia militaris, or court of the conſtable and marſhal, or perſons commiſſioned to exerciſe that juriſdiction. I ſhall touch a little upon each of theſe.

Firſt, the eccleſiaſtical courts, they are of two kinds, viz. Firſt, ſuch as are derived immediately by the king's commiſſion; ſuch was formerly the court of high commiſſion; which though, without the help of an act of parliament, it could not in matters of eccleſiaſtical cognizance uſe any temporal puniſhment or cenſure, as fine, impriſonment, &c.; yet even by the common law, the kings of England, being delivered from papal uſurpation, might grant a commiſſion, to hear and determine eccleſiaſtical cauſes and offences, according to the king's eccleſiaſtical laws, as Cawdry's caſe, Coke's fifth Report. Secondly, ſuch as are not derived by any immediate commiſſion from the king; but the laws of England have annexed to certain offices, eccleſiaſtical juriſdiction, as incident to ſuch offices: thus every biſhop by his election and confirmation, even before conſecration, had eccleſiaſtical juriſdiction annexed to his office, as judex ordinarius within his dioceſe; and diverſe abbots anciently, and moſt archdeacons at this day, by uſage, have had the like juriſdiction within certain limits and precincts.

But although theſe are judices ordinarii, and have eccleſiaſtical juriſdiction annexed to their eccleſiaſtical offices, yet this juriſdiction eccleſiaſtical in foro exteriori is derived from the crown of England: for there is no external juriſdiction, whether eccleſiaſtical or civil, within this realm, but what is derived from the crown: it is true, both anciently, and at this day, the proceſs of eccleſiaſtical courts runs in the name, and iſſues under the ſeal of the biſhop; and that practice ſtands ſo at this day by virtue of ſeveral acts of parliament, too long here to recount. But that is no impediment of their deriving their juriſdictions from the crown; for till 27 H. 8. cap. 24. the proceſs in counties palatine ran in the name of the counts palatine, yet no

man ever doubted, but that the palatine jurisdictions were derived from the crown.

Touching the severance of the bishop's consistory from the sheriff's court: see the charter of king William I. and Mr. Selden's notes on Eadmerus. And see the fifth chapter of this history *(f)*.

Now the matters of ecclesiastical jurisdiction are of two kinds, criminal and civil.

The criminal proceedings extend to such crimes, as by the laws of this kingdom are of ecclesiastical cognizance; as heresy, fornication, adultery, and some others, wherein their proceedings are, pro reformatione morum, & pro salute animæ; and the reason why they have conuzance of those and the like offences, and not of others, as murder, theft, burglary, &c. is not so much from the nature of the offence (for surely the one is as much a sin as the other, and therefore, if their cognizance were of offences quatenus peccata contra Deum, it would extend to all sins whatsoever, it being against God's law.) But the true reason is, because the law of the land has INDULGED unto that jurisdiction the conuzance of some crimes and not of others.

The civil causes committed to their cognizance, wherein the proceedings are ad Instantiam Partis, ordinarily are matters of tythes, rights of institution and induction to ecclesiastical benefices, cases of matrimony and divorces, and testamentary causes, and the incidents thereunto, as insinuation or probation of testaments, controversies touching the same, and of legacies of goods and moneys, &c. *(g)*

Although de Jure Communi the cognizance of wills and testaments does not belong to the ecclesiastical court, but to the temporal or civil jurisdiction; yet de Consuetudine Angliæ pertinet ad Judices Ecclesiasticos, as Linwood himself agrees, Exercit. de Testamentis, cap. 4. in Glossa. So that it is the custom or law of England that gives the extent and limits of their external jurisdiction in Foro Contentioso.

The rule by which they proceed, is the canon law, but not in its full latitude, and only so far as it stands uncor-

(f) For the various species of courts ecclesiastical, see a brief account in the third volume of Mr. Justice Blackstone's Commentaries, from page 61 to 68.

(g) Vide Blac. Com. 3v 87. seq.

rected,

rected, either by contrary acts of parliament, or the common law and cuſtom of England; for there are divers canons made in ancient times, and decretals of the popes that never were admitted here in England, and particularly in relation to tythes; many things being by our laws privileged from tythes, which by the canon law are chargeable, (as timber, oar, coals, &c.) without a ſpecial cuſtom ſubjecting them thereunto.

Where the canon law, or the Stylus Curiæ, is ſilent, the civil law is taken in as a director, eſpecially in points of expoſition and determination, touching wills and legacies.

But things that are of temporal cognizance only, cannot by charter be delivered over to eccleſiaſtical juriſdiction, nor be judged according to the rules of the canon or civil law, which is aliud Examen, and not competent to the nature of things of common law cognizance: And therefore, Mich. 8 H. 4. Rot. 72. coram Rege, when the chancellor of Oxford proceeded according to the rule of the civil law in a caſe of debt, the judgment was reverſed in B. R. wherein the principal error aſſigned was, becauſe they proceeded per Legem Civilem ubi quilibet ligeus Domini Regis Regni ſui Angliæ in quibuſcunque placitis & querelis infra hoc Regnum factis & emergentibus de Jure tractari debet per Communem Legem Angliæ; and although king H. 8. 14 Anno Regni ſui, granted to the univerſity a liberal charter to proceed according to the uſe of the univerſity, viz. by a courſe much conformed to the civil law; yet that charter had not been ſufficient to have warranted ſuch proceedings without the help of an act of parliament: and therefore in 13 Eliz. an act paſſed, whereby that charter was in effect enacted; and 'tis thereby that at this day they have a kind of civil law procedure, even in matters that are of themſelves of common law cognizance, where either of the parties to the ſuit are privileged. (*b*)

The coertion or execution of the ſentence in eccleſiaſtical courts, is only by excommunication of the perſon contumacious, and upon ſignification thereof into Chancery, a writ de Excommunicatio capiendo iſſues, whereby the party is impriſoned till obedience yielded to the ſentence. But beſides this coertion, THE SENTENCES of the eccleſiaſtical courts

(*b*) Vide alſo 13 Eliz. c. 29. and ſee Blac. Com. 3 v. 83, 84, 85.

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touching ſome matters do introduce a REAL EFFECT, without any other execution; as a divorce, a Vinculo Matrimonii for the cauſes of conſanguinity, precontract, or frigidity, do induce a legal diſſolution of the marriage; ſo a ſentence of deprivation from an eccleſiaſtical benefice, does by virtue of the very ſentence, without any other coertion or execution, introduce a full determination of the intereſt of the perſon deprived. [C]

And thus much concerning the eccleſiaſtical courts, and the uſe of the canon and civil law in them, as they are the rule and direction of proceedings therein.

Secondly, the ſecond ſpecial juriſdiction wherein the civil law is allowed, at leaſt as a director or rule in ſome caſes, is the admiral court or juriſdiction. This juriſdiction is derived alſo from the crown of England, either immediately by commiſſion from the king, or mediately, which is ſeveral ways, either by commiſſion from the lord high admiral, whoſe power and conſtitution is by the king, or by the charters granted to particular corporations bordering upon the ſea, and by commiſſion from them, or by preſcription, which nevertheleſs in preſumption of law, is derived at firſt from the crown by charter not now extant.

The admiral juriſdiction is of two kinds, viz. Juriſdictio Voluntaria, which is no other but the power of the lord high admiral, as the king's general at ſea over his fleets; or Juriſdictio contentioſa, which is that power of juriſdiction which the judge of the admiralty has in Foro Contentioſo; and what I have to ſay is of this later juriſdiction.

The juriſdiction of the admiral court, as to the matter of it, is confined by the laws of this realm to things *done upon the high ſea only*; as depredations and piracies upon the high ſea; offences of maſters and mariners upon the high ſea; maritime contracts made and to be executed upon the high ſea; matters of prize and reprizal upon the high ſea. But touching contracts or things made within the bodies of Engliſh counties, or upon the land beyond the ſea, though the execution thereof be in ſome meaſure upon the high ſea, as charter parties, or contracts made even upon the high ſea, touching things that are not in their own nature maritime, as a bond or contract for the payment of money; ſo alſo of damages in navigable rivers, within the bo-

bodies of counties, things done upon the ſhore at low-water, wreck of the ſea, &c. Theſe things belong not to the admiral's juriſdiction: and thus the common law, and the ſtatutes of 13 Rich. 2. cap. 15. 15 Rich. 2. cap. 3. confine and limit their juriſdiction to matters maritime, and ſuch only as are done upon the high ſea. (*i*)

This court is not bottom'd or founded upon the authority of the civil law, but hath both its power and juriſdiction by the law and cuſtom of the realm, in ſuch matters as are proper for its cognizance; (*k*) and this appears by their proceſs, viz. The arreſt of the perſons of the defendants, as well as by attachment of their goods; and likewiſe by thoſe cuſtoms and laws maritime, whereby many of their proceedings are directed, and which are not in many things conformable to the rules of the civil law; ſuch are thoſe ancient laws of Oleron, (*l*) and other cuſtoms introduced by the practice of the ſea, and ſtile of the court.

Alſo, the civil law is allowed to be the rule of their proceedings, only ſo far as the ſame is not contradicted by the ſtatute of this kingdom, or by thoſe maritime laws and cuſtoms, which in ſome points have obtained in derogation of the civil law: but by the ſtatute 28 Hen. 8. cap. 15. all treaſons, murders, felonies, done on the high ſea, or in any haven, river, creek, port or place, where the admirals have, or pretend to have juriſdiction, are to be determined by the king's commiſſion, as if the offences were done at land, according to the courſe of the common law.

(*i*) The original juriſdiction of the admiralty is either by the connivance or permiſſion of the common law courts; the ſtat. of Ric. II. and Hen. IV. are only in affirmance of the common law, and to prevent the great power which the admiralty had gotten in conſequence of the laws of Oleron. Generally ſpeaking the court of admiralty has no juriſdiction of matters, or contracts, done, or made on land; and the true reaſon for their juriſdiction in matters done at ſea, ſhould ſeem to be, becauſe no jury can come from thence, for if the matter ariſe in any place from whence the *pais* can come, the common law will not ſuffer the ſubject to be drawn *ad aliud examen*. 12 Rep. 129. Roll. Abr. 531. Owen 122. Brownl. 37. 2 Roll. Rep. 413. Vide the caſe of Ouſton v. Hebden *paſſim*. 1 Wilſ. 101. See alſo Hob. 12. and Blac. Com. 3 v. 107.

(*k*) According to ſir Henry Spelman, *Gloſſ.* 13. and Lambard, *Archeion.* 41. it was firſt of all erected by king Edward the third.

(*l*) See chapter 7. note (*q*) Co. Lit. 11. Blac. Com. 3 v. 108.

And

And thus much ſhall ſerve touching the court of admiralty, and the uſe of the civil law therein. (*m*)

Thirdly, the third court, wherein the civil law has its uſe in this kingdom, is the military court, held before the conſtable and marſhal anciently, as the Judices Ordinarii in this caſe, or otherwiſe before the king's commiſſioners of that juriſdiction, as Judices Delegati.

The matter of their juriſdiction is declared and limited by the ſtatutes of 8 R. 2. cap. 5. and 13 R. 2. cap. 2. And not only by thoſe ſtatutes, but more by the very common law is their juriſdiction declared and limited as follows, viz.

Firſt, negatively: they are not to meddle with any thing determinable by the common law: and therefore, inaſmuch as matter of damages, and the quantity and determination thereof, is of that conuzance, the court of conſtable and marſhal cannot, even in ſuch ſuits as are proper for their conuzance, give damages againſt the party convicted before them, and at moſt can only order reparation in point of honour, as mendacium ſibi ipſi imponere: (*n*) neither can they, as to the point of reparation, in honour, hold plea of any ſuch words or things, wherein the party is relievable by the courts of the common law. (*o*).

Secondly, affirmatively: their juriſdiction extends to matters of arms and matters of war, viz.

Firſt, as to matters of arms, or heraldry, the conſtable and marſhal had conuzance thereof, viz. touching the rights of coat-armour, bearings, creſts, ſupporters, pennons, &c. And alſo touching the rights of place and precedence, in caſes where either acts of parliament or the king's patent, he being the fountain of honour, have not already determined it; for in ſuch caſes they have no power

(*m*) See further as to the juriſdiction of the maritime courts, Blac. Com. 3 v. 68, 69, 70, 106, 107, 108, 109. Hob. 212. 4 Inſt. 134. Comb. 462. 13 Rep. 53. 2 Lev. 25. Hardr. 183. 1 Sid. 158. 2 Show. 232. Comb. 474.

(*n*) 1 Roll. Abr. 128. See alſo Year-book, 37 Hen. 6. 21. Seld. of duels, c. 10.

(*o*) Vide Blac. Com. 3 v. 68, 103. 104, 105, 106.

to alter it. Thoſe things were anciently allowed to the conuzance of the conſtable and marſhal, as having ſome relation to military affairs; but ſo reſtrained, that they were only to determine the right, and give reparation to the party injured in point of honour, but not to repair him in damages. (*p*)

But, ſecondly, as to matters of war. The conſtable and marſhal had a double power, viz.

1. A miniſterial power, as they were two great ordinary officers, anciently, in the king's army; the conſtable being in effect the king's general, and the marſhal was employed in marſhalling the king's army, and keeping the liſt of the officers and ſoldiers therein; and his certificate was the trial of thoſe whoſe attendance was requiſite. Vide Littleton, §. 102.

Again, 2. the conſtable and marſhal had alſo a judicial power, or a court wherein ſeveral matters were determinable: as firſt, appeals of death or murder committed beyond the ſea, according to the courſe of the civil law. Secondly, the right of priſoners taken in war. Thirdly, the offences and miſcarriages of ſoldiers contrary to the laws and rules of the army: for always preparatory to an actual war, the kings of this realm, by advice of the conſtable, and marſhal, were uſed to compoſe a book of rules and orders, for the due order and diſcipline of their officers and ſoldiers, together with certain penalties on the offenders; and this was called martial law. We have extant in the black book of the admiralty, and elſewhere, ſeveral exemplars of ſuch military laws, and eſpecially that of the ninth of Richard II. compoſed by the king, with the advice of the duke of Lancaſter, and others.

But touching the buſineſs of martial law, theſe things are to be obſerved (*q*), viz.

Firſt, that in truth and reality it is not a law, but ſomething indulged, rather than allowed, as a law; the neceſſity of government, order and diſcipline in an army, is that

(*p*) Vide Blac. Com. 3 v. 105.

(*q*) For a fuller account of our military and maritime ſtates, ſee the 13th chapter of the firſt book of Mr. Juſtice Blackſtone's Commentaries.

only

only which can give thoſe laws a countenance, quod enim neceſſitas cogit defendi.

Secondly, this indulged law was only to extend to members of the army, or to thoſe of the oppoſite army, and never was ſo much indulged as intended to be executed or exerciſed upon others; for others who were not liſted under the army, had no colour or reaſon to be bound by military conſtitutions, applicable only to the army, whereof they were not parts; but they were to be ordered and governed according to the laws to which they were ſubject, though it were a time of war.

Thirdly, that the exerciſe of martial law, whereby any perſon ſhould loſe his life, or member, or liberty, may not be permitted in time of peace, when the king's courts are open for all perſons to receive juſtice, according to the laws of the land. This is in ſubſtance declared by the petition of right, 3 Car. 1. whereby ſuch commiſſions and martial law were repealed, and declared to be contrary to law: and accordingly was that famous caſe of Edmond earl of Kent; who being taken at Pomfret, 15 Edw. II. the king and divers lords proceeded to give ſentence of death againſt him, as in a kind of military court by a ſummary proceeding; which judgment was afterwards, in 1 Edw. III. reverſed in parliament: and the reaſon of that reverſal ſerving to the purpoſe in hand, I ſhall here inſert it as entered in the record, viz.

" Quod cum quicunq; homo ligeus Domini regis pro " ſeditionibus, &c. tempore pacis captus & in quacunque " curia Domini regis ductus fuerit de ejuſmodi ſeditionibus " & aliis felonius ſibi impoſitis per legem & conſuetudine " regni arrectari debet & reſponſionem adduci, et inde per " communem legem, antequam fuerit morti adjudicand' " (triari) &c. Unde cum notorium ſit & manifeſtum " quod totum tempus quo impoſitum fuit eidem comiti " propter mala & facinora feciſſe, ad tempus in quo cap- " tus fuit & in quo morti adjudicatus fuit, fuit tempus " pacis maximæ, cum per totum tempus prædictum & " cancellaria & aliæ plac. curiæ Domini regis aperte fuer' " in quibus cuilibet lex fiebatur ſicut fieri conſuevit, Nec " idem Dominus rex unquam tempore illo cum vexillis

"explicatis equitabat," &c. And accordingly the judgment was reverſed; for martial law, which is rather indulged than allowed, and that only in caſes of neceſſity, in time of open war, is not permitted in time of peace, when the ordinary courts of juſtice are open.

In this military court, court of honour, or court martial, the civil law has been uſed and allowed in ſuch things as belong to their juriſdiction, as the rule or direction of their proceedings and deciſions; ſo far forth as the ſame is not controuled by the laws of this kingdom, and thoſe cuſtoms and uſages which have obtained in England, which even in matters of honour are in ſome points derogatory to the civil law. But this court has been long diſuſed upon great reaſons.

And thus I have given a brief proſpect of theſe courts and matters, wherein the canon and civil law has been in ſome meaſure allowed, as the rule or direction of proceedings or deciſions: but although in theſe courts and matters the laws of England, upon the reaſons and account before expreſſed, have admitted the uſe and rule of the canon and civil law; yet even herein alſo, the common law of England has retained thoſe ſigna ſuperioritatis, and the preference and ſuperintendence in relation to thoſe courts: namely,

Firſt, as the laws and ſtatutes of the realm have preſcribed to thoſe courts their bounds and limits, ſo the courts of common law have the ſuperintendency over thoſe courts, to keep them within the limits and bounds of their ſeveral juriſdictions, and to judge and determine whether they have exceeded thoſe bounds, or not; and in caſe they do exceed their bounds, the courts at common law iſſue their prohibitions to reſtrain them, directed either to the judge or party, or both: and alſo, in caſe they exceed their juriſdiction, the officer that executes the ſentence, and in ſome caſes the judge that gives it, are puniſhable in the courts at common law; ſometimes at the ſuit of the king, ſometimes at the ſuit of the party, and ſometimes at the ſuit of both, according to the variety and circumſtances of the caſe (*r*).

(*r*) Vide Blac. Com. 1 v. 84.

Se-

Secondly, the common law, and the judges of the courts of common law, have the expoſition of ſuch ſtatutes or acts of parliament as concern either the extent of the juriſdiction of thoſe courts (whether eccleſiaſtical, maritime or military) or the matters depending before them; and therefore, if thoſe courts either refuſe to allow theſe acts of parliament, or expound them in any other ſenſe than is truly and properly the expoſition of them, the king's great courts of the common law, who next under the king and his parliament have the expoſition of thoſe laws, may prohibit and controul them (*s*).

And thus much touching thoſe courts wherein the civil and canon laws are allowed as rules and directions under the reſtrictions above-mentioned: touching which, the ſum of the whole is this:

Firſt, that the juriſdiction exerciſed in thoſe courts is derived from the crown of England, and that the laſt devolution is to the king, by way of appeal.

Secondly, that although the canon or civil law be reſpectively allowed as the direction or rule of their proceedings; yet that is not as if either of thoſe laws had any original obligation in England, either as they are the laws of emperors, popes, or general councils, but only by virtue of their admiſſion here, which is evident; for that thoſe canons or imperial conſtitutions which have not been received here do not bind; and alſo, for that by ſeveral contrary cuſtoms and ſtiles uſed here, many of thoſe civil and canon laws are controuled and derogated.

Thirdly, that although thoſe laws are admitted in ſome caſes in thoſe courts, yet they are but leges ſub graviori lege; and the common law of this kingdom has ever obtained and retained the ſuperintendency over them, and thoſe ſigna ſuperioritatis before-mentioned, for the honour of the king and the common law of England (*t*).

(*s*) Vide Blac. Com. 1 v. 84.

(*t*) Such laws, (ſays Blackſtone) thus admitted, reſtrained, altered, new modelled and amended, are by no means wirh us a diſtinct independent ſpecies of laws, but are inferior branches of the cuſtomary or unwritten laws of England, properly called the king's eccleſiaſtical, the king's military, the king's maritime, or the king's academical laws. Com. 1 v. 84.

ADDITIONAL NOTES

TO THE

SECOND CHAPTER.

NOTE [A] p. 27.

ALL the ſtrength that either the papal or the imperial laws have obtained in this, or indeed in any other ſtate in Europe, is only becauſe they have been admitted and received by immemorial uſage and cuſtom in ſome particular caſes and in ſome particular courts; then, to uſe the words of Mr. juſtice Blackſtone, they form a branch of the *leges non ſcriptæ*, or cuſtomary law; or elſe, becauſe they are in ſome other caſes introduced by conſent of parliament, and then they owe their validity to the *leges ſcriptæ*, or ſtatute law. This is declared by the expreſs and remarkable words of the ſtatute 25 Hen. 8. c. 21. intituled "the act concerning Peter-pence and Diſpenſations," "your grace's realm, (ſays the ſtatute) recognizing no ſuperior "under God, but only your grace, hath been and is free from "ſubjection to any man's laws, but only to ſuch as have been "deviſed, made and obtained WITHIN this realm, for the wealth "of the ſame, or to ſuch other as by ſufferance of your grace, "and your progenitors, the people of this your realm have taken "at their free liberty, by their own conſent to be uſed amongſt "them, and have bound themſelves BY LONG USE AND CUSTOM "to the obſervance of the ſame, not as to the obſervance of "laws of any foreign prince, potentate or prelate, but as to "the CUSTOMED and antient laws of this realm, originally eſta-"bliſhed as laws of the ſame, by the ſaid ſufferance, conſents "and cuſtom, and none otherwiſe." For an elegant enquiry into the canon and Roman law, and when the ſtudy of law, as a ſcience, became a diſtinct employment, ſee Dr. Robertſon's Hiſt. Emp. Cha. V. oct. 1 v. 74, 76, 78, 81, 381. and note 25. of that admirable work.

NOTE

NOTE [B] p. 27.

Matthew verſus Burdett, Hill. 1 Ann. B. R. In the primitive church, the laity were preſent at all ſynods: when the empire became Chriſtian, no canon was made without the emperor's conſent: the emperor's conſent included that of the people, he having in himſelf the whole legiſlative power, which our kings have not: therefore if the king and clergy make a canon, it binds the clergy in *re eccleſiaſticâ*, but it does not bind laymen; they are not repreſented in convocation; their conſent is neither aſked nor given. 1 Salk. 412. See alſo 12 Co. 72. 2 Inſt. 57, 647, 653, 657. 2 Rol. Abr. 226, 454. Mo. 782. Br. ordinary, 1. 2 Cro. 670. 2 Brownl. 38. Cro. Car. 588. Palmer 379. 3 Salk. 318. 2 Ventr. 44. 2 Lev. 222. 2 Inſt. 97. Caſes tempore lord Hardwicke, 57, 326, 395. 2 Stran. 1057.

NOTE [C] p. 31.

Though numerous authorities may be educed, to prove that the power of the courts eccleſiaſtical has been recognized by the courts of common law, and that their deciſions have ever been conſidered as concluſive upon every queſtion over which they have been accuſtomed to exerciſe original juriſdiction; yet, the recent caſe of the dutcheſs of Kingſton, has thrown ſuch a glare of light upon the ſubject, that I have taken the liberty to ſubjoin a trifling account of that memorable tranſaction.

Her grace was tried before the peers, in parliament, for bigamy; the indictment ſtating that ſhe "being the wife of Auguſtus "John Hervey, felonioufly did marry and take to huſband "Evelyn Pierrepont, duke of Kingſton, her former huſband "being then alive." After her grace had pleaded to the indictment, and before the caſe on the part of the proſecution was entered into, ſhe obſerved that in reſpect to the ſuppoſed contract of marriage with Mr. Hervey, and which was the ſole ground of proſecution, ſhe had, prior to her marriage with the duke of Kingſton, inſtituted a ſuit in the conſiſtory court of the biſhop of London, *cauſa jactitationis matrimonii*; that in that ſuit Mr. Hervey was the party libelled, and of courſe the party defendant; that though in his defence he inſiſted on the marriage; yet, the court eccleſiaſtical decreed, that ſhe was free from any matrimonial contract with Mr. Hervey; that the ſen-

tence being unreverſed and unimpeached, was as ſhe humbly conceived, concluſive, and that therefore no other evidence ought to be received by their lordſhips in reſpect to that pretended marriage; for that, a court of competent juriſdiction having decided the point, it would not only be illegal, but in vain, to call parole evidence to ſubſtantiate the fact.

After ſome altercation, the proceedings in the ſuit of jactitation, were permitted to be read *de bene eſſe*. By the ſentence it was in form decreed that the preſent defendant was "free from "all matrimonial contracts or eſpoufals; more eſpecially with "the ſaid Auguſtus John Hervey," who was, by the ſentence enjoined to "perpetual ſilence as to the premiſes libellate."

This ſentence being read, the counſel for her grace, after ſtating that the noble priſoner had, ſubſequent to the ſentence and in confidence of its legality, married the late duke of Kingſton, obſerved, that they did not know of any court in which the conſtitution of this kingdom had veſted authority to decide on the rights of marriage, but the eccleſiaſtical; and they believed that it would not be contended, that the courts of common law had any ſuch original juriſdiction. They admitted that marriage might incidentally be determined in the courts of common law, as abſolutely neceſſary to the due adminiſtration of juſtice; but, they inſiſted, that whenever the proper *forum* had decided on the queſtion, the courts of common law had never taken upon themſelves to examine into the grounds, nor in the leaſt to queſtion the validity of that determination. Hence they ſubmitted that the ſentence, being unimpeached and not reverſed, was concluſive ſo long as it remained in force, and that of neceſſity it muſt be received in evidence in all courts and in all places, where the ſubject of that marriage ſhould become a point of litigation; on the whole, therefore, they truſted that it would repel all teſtimony, and of conſequence, make it improper to ſtate any.

A queſtion of this magnitude required more than ordinary time, for elucidation and deciſion. On the firſt day, (Monday the 15th of April, 1776,) it was very ably argued by Mr. Wallace, Mr. Mansfield, Doctor Calvert, and Doctor Wynne, in ſupport of the ſentence; all of whom contended, that from the legal authorities which they had adduced, in ſupport of the poſition which they had advanced, there was no ground to impeach the ſentence; that it was final and concluſive; that the indictment was therefore indefenſible; and that as no evidence could be received, it would be idle and impertinent, and of no uſe to ſtate any.

On

On Tueſday, the 16th of April, the counſel for the proſecution were heard in anſwer to theſe objections.

After premiſing that the debate was of a very ſingular complection, upon a point perfectly new in experience, not analogous to any known rule of proceeding in ſimilar caſes, nor founded on any principle which had been ſtated, they inſiſted that if the ſentence was a definitive and preclusive objection to all enquiry, the priſoner ought to have pleaded it in bar of the indictment; or have relied upon it in evidence, under her plea of not guilty. To ſay that ſuch a motion was wholly unprecedented, went, as they contended, a great way in concluſion againſt it. To ſay that ſuch a rule would be inconſiſtent with the plea, and repugnant to the record, ſeemed to them, obviouſly deciſive. "After putting herſelf, (continued theſe ingenious "advocates) for trial upon God and your lordſhips, ſhe be-"ſeeches you not to hear her tried." By this mode, added they, "every ſpecies and colour of guilt, within the compaſs "of the indictment, is neceſſarily admitted; the crime muſt "therefore be taken as proved, in its greateſt extent, with every "baſe and every hateful aggravation, that it can poſſibly admit; "the firſt marriage ſolemnly celebrated, perfectly conſummated; "the ſecond, wickedly accompliſhed by practiſing a concerted "fraud upon a court of juſtice, and that in order to obtain a "colluſive ſentence againſt the firſt," After thus expatiating in general terms, they proceeded to controvert the principles and the authorities which had been advanced in favor of the priſoner; and after eſtabliſhing the poſitions for which themſelves contended, they inferred that the motion was wholly inadmiſſible; that it was inconſiſtent with, and repugnant to all order, and every mode of trial, to debate on imaginary topics of defence, before the charge was publicly and fully heard, and that it was equally ſo, for the court to reſolve abſtract queſtions, upon hypothetical grounds.

The judicious manner, in which this argument was maintained on the part of the proſecution, reflects the higheſt honour on the gentlemen who conducted it. The advocates were, Mr. attorney general Thurlow, Mr. ſolicitor general Wedderburn, Mr. Dunning, and Dr. Harris.—Mr. attorney general, in concluding his ſpeech, remarked, that the ſentence was concluſive upon the priſoner, but merely void as againſt the reſt of the world; "ſhe is therefore (continued this learned and eloquent "lawyer) a wife, only for the purpoſe of being puniſhed as a "felon. The crime has been detected. The inconvenient "conſequences of guilt are the bars, which God, and the or-"der of nature, have ſet againſt it: but they have not been

"found

" found ſufficient. It demands the interpoſition of public au-
" thority, with ſeverer checks, to reſtrain it. Why is ſhe thus
" hampered with the ſentence which ſhe fabricated? becauſe ſhe
" fabricated it: becauſe juſtice will not permit her to alledge her
" own fraud, for her own behoof; nor hear her complain of a
" wrong, which *ſhe* herſelf has wantonly committed."

" Is a ſentence pronounced between two certain perſons ad-
" miſſible evidence againſt others? is this ſpecies of ſentence
" ſo? is either admiſſible againſt the king—in any public pro-
" ſecution—in this particular ſort of proſecution? is ſuch evi-
" dence probable only, or concluſive,—againſt the parties to it—
" againſt ſtrangers—againſt the king—and in what caſes? what,
" if it were obtained by colluſion? what, if by HER colluſion?
" will it ſerve HER? may SHE offer it ſafely? how much will
" it prove againſt HER? what evidence will do to prove the
" colluſion? there is no end of ſuch queſtions. Were it
" poſſible for your lordſhips to ſtop this proſecution here, I
" have no deſire to wound the mind of any perſon, unneceſ-
" ſarily, if ſo painful a duty may be diſpenſed with. But I
" have rather wondered to hear ſuch hopes as theſe thus far
" encouraged, or even entertained on the part of the priſoner;
" with confidence enough to make it worth her while to avow,
" in this ſtage of the buſineſs, that ſhe had rather have every
" thing preſumed againſt her, than hear any thing proved; and
" to diſcloſe to your lordſhips, not an anxiety to clear her in-
" jured innocence, but a dread of the enquiry."

The lords now adjourned to Friday the 19th of April, when, Mr. Wallace was called on to reply; which having done, the peers adjourned to the chamber of parliament, where it was ordered that the following queſtions ſhould be put to the judges, viz.

I. Whether a ſentence of the ſpiritual court againſt a marriage, in a ſuit for jactitation of marriage, is concluſive evidence ſo as to ſtop the counſel for the crown from proving the ſaid marriage in an indictment for polygamy?

II. Whether admitting ſuch ſentence to be concluſive upon ſuch indictment, the counſel for the crown may be admitted to avoid the effect of ſuch ſentence, by proving the ſame to have been obtained by fraud or colluſion?

The

The chief juſtice of the common pleas, having conferred with the reſt of the judges preſent, delivered the following unanimous opinion upon the queſtions:

MY LORDS,

My lord chief baron, and the reſt of my brethren, have deſired me to deliver their anſwer to the queſtions your lordſhips have been pleaſed to propound to us.

That our opinion may be the better underſtood, it is neceſſary to make ſome obſervations on what has paſſed in argument upon the ſubject.

What has been ſaid at the bar is certainly true, as a general principle, that a tranſaction between two parties, in judicial proceedings, ought not to be binding upon a third; for it would be unjuſt to bind any perſon who could not be admitted to make a defence, or to examine witneſſes, or to appeal from a judgment he might think erroneous; and therefore the depoſitions of witneſſes in another cauſe in proof of a fact, the verdict of a jury finding the fact, and the judgment of the court upon fact found, although evidence againſt the parties, and all claiming under THEM, are not, in general, to be uſed to the prejudice of ſtrangers. There are ſome exceptions to this general rule, founded upon particular reaſons, but not being applicable to the preſent ſubject, it is unneceſſary to ſtate them.

From the variety of caſes relative to judgments being given in evidence in civil ſuits, theſe two deductions ſeem to follow as generally true. Firſt, that the judgment of a court of concurrent juriſdiction, directly upon the point, is as a plea, a bar, or as evidence, concluſive, between the ſame parties, upon the ſame matter, directly in queſtion in another court. Secondly, that the judgment of a court of excluſive juriſdiction, directly upon the point, is, in like manner, concluſive upon the ſame matter, between the ſame parties, coming incidentally in queſtion in another court, for a different purpoſe. But neither the judgment of a concurrent or excluſive juriſdiction is evidence, of any matter which came collaterally in queſtion, though within their juriſdiction; nor of any matter incidentally cognizable; nor of any matter to be inferred by argument from the judgment.

Upon the ſubject of marriage, the ſpiritual court has the ſole and excluſive cognizance of queſtioning and deciding directly, the legality of marriage; and of inforcing, ſpecifically, the rights and obligations, reſpecting perſons depending upon it; but the temporal courts have the ſole cognizance of examining and deciding, upon all temporal rights of property; and, ſo far as ſuch rights are concerned, they have the inherent power of deciding

deciding incidentally, either upon the fact, or the legality of marriage, where they lie in the way to the deciſion of the proper objects of their juriſdiction; they do not want or require the aid of the ſpiritual courts; nor has the law provided any legal means of ſending to them for their opinion; except where, in the caſe of marriage, an iſſue is joined upon the record in certain real writs, upon the legality of marriage, or its immediate conſequence, "general baſtardy;" or, in like manner, in ſome other particular inſtances, lying peculiarly in the knowledge of their courts; as profeſſion, deprivation, and ſome others; in theſe caſes, upon the iſſue ſo formed, the mode of trying the queſtion is by reference to the ordinary; whoſe certificate, when returned, received, and entered upon record in the temporal courts, is a perpetual and concluſive evidence againſt all the world, upon that point; which exceptionable extent, on whatever reaſons founded, was the occaſion of the ſtatute of the 9th of Henry VI. requiring certain public proclamations to be made for perſons intereſted to come in, and be parties to the proceeding. But, even in theſe caſes, if the ordinary ſhould return no certificate, or an inſufficient one; or, if the iſſue is accompanied with any ſpecial circumſtances; as, if a ſecond iſſue, triable by a jury, is formed upon the ſame record; or, if the effect of the ſame iſſue is put into another form; a jury is to decide, and not the ordinary to certify, the truth; and to this purpoſe ſir William Staunford mentions a remarkable inſtance. Bigamy was triable by the biſhop's certificate; but if the priſoner, to avoid the charge, pleads that the ſecond eſpouſals were null and void, becauſe he had a former wife living, this ſpecial bigamy was not to be tried by the biſhop's certificate.

So that the trial of marriage, either as to legality, or fact, was not abſolutely, and from its nature, an object *alieni fori*.

There was a time, when the ſpiritual courts wiſhed that their determinations might, in all caſes, be received as authentic in the temporal courts; and in that ſolemn aſſembly of the king, the peers, the biſhops, and the judges, convened for the purpoſe of ſettling the demands of the church, by Edward the ſecond, one of the claims was expreſſed in theſe words. "Si aliqua "cauſa, vel negotium, cujus cognitio ſpectat ad forum eccleſiaſ-"ticum, et coram eccleſiaſtico judice fuerit ſententialiter ter-"minatum, et tranſierit in rem judicatum, nec per appellationem "fuerit ſuſpenſum; et poſtmodum, coram judice ſeculari, ſuper "eâdem re, inter eaſdam perſonas, quæſtio moveatur, et "provetur per teſtes, vel inſtrumentâ, talis exceptio in foro "ſeculari non admittatur." The anſwer to which demand was expreſſed in this manner: "Quando eadem cauſa, diverſis "rationibus coram judicibus eccleſiaſticis, et ſecularibus, ven-

"tilatur

" tilatur, dicunt, quod (non obſtante eccleſiaſtico judicio) " curia regis ipſum tractet negotium, ut ſibi expedire videtur." For which lord Coke gives this reaſon, 2 Inſt. c. 22. " For " the ſpiritual judges proceedings are for the correction of the " ſpiritual inner man, and pro ſalute animæ, to injoin him pe- " nance; and the judges of the common law proceed to give " damages and recompence for the wrong and injury done." and then adds, " and ſo this article was deſervedly rejected."

And the ſame demand was made, and received the ſame anſwer, in the third year of king James the firſt.

It is to be obſerved, that this demand related only to civil ſuits between the ſame parties; and that the ſentence ſhould be received as a plea in bar. But this attempt and miſcarriage did not prevent the temporal courts from ſhewing the ſame reſpect to their proceedings, as they did to thoſe in other courts. And therefore where in civil cauſes, they found the queſtion of marriage directly determined by the eccleſiaſtical courts, they received the ſentence, though not as a plea, yet as PROOF of the fact; it being an authority accredited in a judicial proceeding by a court of competent juriſdiction; but ſtill they received it upon the ſame principles, and ſubject to the ſame rules, by which they admit the acts of other courts.

Hence a ſentence of nullity, and a ſentence in affirmance of a marriage, have been received as concluſive evidence on a queſtion of legitimacy, ariſing incidentally upon a claim to a real eſtate.

A ſentence in a cauſe of jactitation has been received upon a title in ejectment, as evidence againſt a marriage; and, in like manner in perſonal actions, immediately founded upon a ſuppoſed marriage.

So a direct ſentence, in a ſuit upon a promiſe of marriage, againſt the contract, has been admitted evidence againſt ſuch contract, in an action brought upon the ſame promiſe for damages; it being a direct ſentence of a competent court, diſproving the ground of the action.

So a ſentence of nullity is equally evidence in a perſonal action againſt a defence founded upon a ſuppoſed coverture.

But in all theſe caſes, the parties to the ſuit, or at leaſt the parties againſt whom the evidence was received, were parties to the ſentence, and had acquieſced under it; or claimed under thoſe who were parties, and had acquieſced.

But although the law ſtands thus with regard to civil ſuits, proceedings in matters of crime, and eſpecially of felony, fall under a different conſideration. Firſt, becauſe the parties are not the ſame; for the king, in whom the truſt of proſecuting public offences is veſted, and which is executed by his immediate

diate orders, or in his name by ſome proſecutor, is no party to ſuch proceedings in the eccleſiaſtical court, and cannot be admitted to defend, or to examine witneſſes, or in any manner to intervene, or appeal. Secondly, ſuch doctrines would tend to give the ſpiritual courts, which are not permitted to exerciſe any judicial cognizance in matters of crime, an immediate influence in trials for offences, and to draw the deciſion from the courſe of the common law, to which it ſolely and peculiarly belongs.

The ground of the judicial powers given to eccleſiaſtical courts, is, merely, of a ſpiritual conſideration, *pro correctione morum, et pro ſalute animæ.* They are therefore addreſſed to the conſcience of the party. But one great object of temporal juriſdiction is the public peace; and crimes againſt the public peace are wholly, and in all their parts, of temporal cognizance alone. A felony by common law was always ſo. A felony by ſtatute becomes ſo at the moment of it's inſtitution. The temporal courts alone can expound the law, and judge of the crime, and it's proofs; in doing ſo, they muſt ſee with their own eyes, and try by their own rules, that is, by the common law of the land; it is the truſt and ſworn duty of their office.

When the acts of Henry the eighth firſt declared what marriages ſhould be lawful, and what inceſtuous, the temporal courts, though they had before no juriſdiction, and the acts did not by expreſs words give them any upon the point, decided, incidentally, upon the conſtruction, declared what marriages came within the levitical degrees, and prohibited the ſpiritual courts from giving or proceeding upon any other conſtruction.

Whilſt an antient ſtatute ſubſiſted (2 H. IV. 15.) by which perſonal puniſhment was incurred on holding heretical doctrines, the temporal courts took notice, incidentally, whether the tenet was heretical or not; for "the king's courts will examine all "things ordained by ſtatute."

When the ſtatute of W. III. made certain blaſphemous doctrines a temporal crime, the temporal courts alone could determine whether the doctrine complained of was blaſphemous ſo as to conſtitute the crime.

If a man ſhould be indicted for taking a woman by force, and marrying her; or for marrying a child without her father's conſent; or for a rape,—where the defence is, that "the woman is "his wife;" in all theſe caſes, the temporal courts are bound to try the priſoner by the rules and courſe of the common law, and, incidentally, to determine what is heretical and what is blaſphemous; and whether it was a marriage within the ſtatute; a marriage without conſent; and whether, in the laſt caſe, the woman was his wife: but if they ſhould happen to find, that

ſentences,

ſentences, in the reſpective caſes, had been given in the ſpiritual court upon the hereſy, the blaſphemous doctrines, the marriage by force, the marriage without conſent, and the marriage on the rape; and the court muſt receive ſuch ſentences as concluſive evidence, in the firſt inſtance, without looking into the caſe, it would veſt the ſubſtantial and effective deciſion, though not the cognizance, of the crimes, in the ſpiritual court; and leave to the jury, and the temporal courts, nothing but a nominal form of proceeding, upon what would amount to a predetermined conviction or acquittal; which muſt have the effect of a real prohibition, ſince it would be in vain to prefer an indictment, where an act of a foreign court ſhall, at once, ſeal up the lips of the witneſſes, the jury, and the court, and put an intire ſtop to the proceeding.

And yet it is true, that the ſpiritual courts have no juriſdiction, directly or indirectly in any matter not altogether ſpiritual; and it is equally true, that the temporal courts have the ſole and intire cognizance of crimes, which are wholly and altogether temporal in their nature.

And if the rule of evidence muſt be, as it is often declared to be, reciprocal; and that, in all caſes, in which ſentences, favourable to the priſoner, are to be admitted as concluſive evidence for him; the ſentences, if unfavourable to the priſoner, are in like manner concluſive evidence againſt him; in what ſituation muſt the priſoners be, whoſe life, or liberty, or property, or fame, reſts on the judgments of courts, which have no juriſdiction over them in the predicament in which they ſtand? and in what ſituation are the judges of the common law, who muſt condemn, on the word of an eccleſiaſtical judge, without exerciſing any judgment of their own?

The ſpiritual court alone can deprive a clergyman: felony is a good cauſe of deprivation: yet in lord Hobart's reports it is held, that they cannot proceed to deprive for felony, before the felony has been tried at law; and although, after conviction, they may act upon THAT, and make the conviction a ground of deprivation, neither ſide can prove or diſprove any thing againſt the verdict; becauſe, as that very learned judge declares, "it would be to determine, though not capitally, upon a ca-"pital crime, and thereby judge of the nature of the crime, "and the validity of the proofs; neither of which belongs to "them to do."

If therefore ſuch a ſentence, even upon a matter within their juriſdiction, and before a felony committed, ſhould be concluſive evidence on a trial for a felony committed after, the opinion of a judge, incompetent to the purpoſe, reſulting (for aught appears) from incompetent proofs (as ſuppoſe the ſuppletory

oath) will direct, or rule, a jury and a court, of competent jurisdiction, without confronting any witnesses, or hearing any proofs: for the question supposes, and the truth is, that the temporal court does not and cannot examine, whether the sentence is a just conclusion from the case, either in law or fact; and the difficulty will not be removed by presuming, that every court determines rightly, because it must be presumed too, that the parties did right in bringing the full and true case before the court; and if they did, still the court will have determined rightly by ecclesiastical laws and rules, and not by those laws and rules by which criminals are to stand or fall in this country.

If the reason for receiving such sentence is, because it is the judgment of a court COMPETENT to the inquiry then before them; from the same reason, the determination of two justices of the peace upon the fact or validity of a marriage, in adjudging a place of settlement, may hereafter be offered as evidence, and give the law to the highest court of criminal jurisdiction.

But if a direct sentence upon the identical question, in a matrimonial cause, should be admitted as evidence (though such sentence against the marriage has not the force of a final decision, that there was none) yet a cause of jactitation is of a different nature; it is ranked as a cause of DEFAMATION only, and not as a matrimonial cause, unless where the defendant pleads a marriage; and whether it continues a matrimonial cause throughout, as some say, or ceases to be so on failure of proving a marriage, as others have said, still the sentence has only a negative and qualified effect, viz. "That the party has failed in his "proof, and that the libellant is free from all matrimonial con-"tract, as far as yet appears;" leaving it open to new proofs of the same marriage in the same cause, or to any proofs of that or any other marriage in another cause: and if such sentence is no plea to a new suit there, and does not conclude the court which pronounces, it cannot conclude a court, which receives the sentence, from going into new proofs to make out that, or any other marriage.

So that admitting the sentence in its full extent and import, it only proves, that it did not YET appear that they were married, and not, that they were NOT married at all: and, by the rule laid down by lord chief justice Holt, such sentence can be no proof of any thing to be inferred by argument from it; and therefore it is not to be inferred, that there was no marriage at any time or place, because the court had not THEN sufficient evidence to prove a marriage at a particular time and place. That sentence, and this judgment, may stand well together, and both propositions be equally true; it may be true, that the spiritual court had not then sufficient proof of the marriage specified,

fied, and that your lordſhips may now, unfortunately, find ſufficient proof of ſome marriage.

But if it was a direct and deciſive ſentence upon the point, and, as it ſtands, to be admitted as concluſive evidence upon the court, and not to be impeached from within; yet, like all other acts of the higheſt judicial authority, it is impeachable from without; although it is not permitted to ſhew that the court was *miſtaken*, it may be ſhewn that they were *miſled*.

Fraud is an extrinſic collateral act, which vitiates the moſt ſolemn proceedings of courts of juſtice. Sir Edward Coke ſays, it avoids all judicial acts, eccleſiaſtical or temporal.

In *civil ſuits*, all ſtrangers may falſify, for covin, either fines, or real or feigned recoveries; and even a recovery by a juſt title, if colluſion was practiſed to prevent a fair defence; and this, whether the covin is apparent upon the record, as not eſſoining, or not demanding the view, or by ſuffering judgment by confeſſion or default; or extrinſic, as not pleading a releaſe, collateral warranty, or other advantageous pleas.

In *criminal proceedings*, if an offender is convicted of felony on confeſſion, or is outlawed, not only the time of the felony, but the felony itſelf may be traverſed by a purchaſer, whoſe conveyance would be affected as it ſtands; and, even after a conviction by verdict, he may traverſe the time.

In the proceedings of the *eccleſiaſtical* court, the ſame rule holds. In Dyer there is an inſtance of a ſecond adminiſtration, fraudulently obtained, to defeat an execution at law againſt the firſt; and the fact being admitted by demurrer, the court pronounced againſt the fraudulent adminiſtration. In another inſtance, an adminiſtration had been fraudulently revoked; and the fact being denied, iſſue was joined upon it; and the colluſion being found by a jury, the court gave judgment againſt it.

In the more modern caſes, the queſtion ſeems to have been, whether the *parties* ſhould be admitted to prove colluſion; not ſeeming to doubt but that ſtrangers might.

So that colluſion, being a matter extrinſic of the cauſe, may be imputed by a ſtranger, tried by a jury, and determined by the courts of temporal juriſdiction.

And if fraud will vitiate the judicial acts of the temporal courts, there ſeems as much reaſon to prevent the miſchiefs ariſing from colluſion in the eccleſiaſtical courts, which, from the nature of their proceedings, are at leaſt as much expoſed, and which we find have been, in fact, as much expoſed, to be practiſed upon for ſiniſter purpoſes, as the courts in Weſtminſter-hall.

We are therefore unanimouſly of opinion:

Firſt, That a ſentence in the ſpiritual court againſt a marriage, in a ſuit o jactitation of marriage, is *not* concluſive evidence,

ſo as to ſtop the counſel for the crown from proving the marriage in an indictment for polygamy.

But ſecondly, admitting ſuch ſentence to be concluſive upon ſuch indictment, the counſel for the crown may be admitted to avoid the effect of ſuch ſentence, by proving the ſame to have been obtained by fraud or colluſion.

The point being thus candidly and deliberately agitated, and thus clearly and unanimouſly decided, the peers returned, and, being ſeated, the lord high ſteward directed the attorney general, to proceed in the ſtatement of the charge. This being done, and the fact being clearly proved, her grace, was in conſequence, found guilty, by the unanimous voice of her peers. Henry Fienes Pelham, duke of Newcaſtle, in ſome meaſure indeed, differed from the reſt, by declaring that her grace in his opinion, was "guilty erroneouſly, but not intentionally."

CHAP.

CHAP. III.

Concerning the common law of England, *its uſe and excellence, and the reaſon of its denomination.* [*Vide Mr. Juſtice* Blackſtone's *third ſection of the introduction to his Commentaries.*]

I Come now to that other branch of our laws, the common municipal law of this kingdom, which has the ſuperintendency of all thoſe other particular laws uſed in the before-mentioned courts, and is the common rule for the adminiſtration of common juſtice in this great kingdom; of which it has been always tender, and there is great reaſon for it; for it is not only a very juſt and excellent law in itſelf, but it is ſingularly accommodated to the frame of the Engliſh government, and to the diſpoſition of the Engliſh nation; and ſuch as by a long experience and uſe is as it were incorporated into their very temperament, and, in a manner, become the complexion and conſtitution of the Engliſh commonwealth.

Inſomuch, that even as in the natural body the due temperament and conſtitution does by degrees work out thoſe accidental diſeaſes which ſometimes happen, and do reduce the body to its juſt ſtate and conſtitution; ſo when at any time through the errors, diſtempers, or iniquities of men, or times, the peace of the kingdom, and right order of government, have received interruption, the common law has waſted and wrought out thoſe diſtempers, and reduced the kingdom to its juſt ſtate and temperament, as our preſent (and former) times can eaſily witneſs.

This law is that which aſſerts, maintains, and, with all imaginable care, provides for the ſafety of the king's royal perſon, his crown and dignity, and all his juſt rights, revenues, powers, prerogatives and government, as the great foundation (under God) of the peace, happineſs, honour and juſtice of this kingdom; and this law is alſo, that which declares and aſſerts the rights and liberties, and the properties of the ſubject; and is the juſt, known, and con-

mon rule of juſtice and right between man and man, within this kingdom.

And from hence it is, that the wiſdom of the kings of England, and their great council, the honourable houſe of parliament, have always been jealous and vigilant for the reformation of what has been at any time found defective in it, and ſo to remove all ſuch obſtacles as might obſtruct the free courſe of it, and to ſupport, countenance and encourage the uſe of it, as the beſt, ſafeſt and trueſt rule of juſtice in all matters, as well criminal as civil.

I ſhould be too voluminous to give thoſe ſeveral inſtances that occur frequently in the ſtatutes, the parliament rolls, and parliamentary petitions, touching this matter; and ſhall therefore only inſtance in ſome few particulars in both kinds, viz. criminal and civil: and firſt, in matters civil.

In the parliament 18 Edw. I. in a petition in the lords houſe, touching land, between Hugh Lowther and Adam Edingthorp; the defendant alledges, that if the title ſhould in this manner be proceeded in, he ſhould loſe the benefit of his warranty; and alſo, that the plaintiff, if he hath any right, hath his remedy at common law by aſſize of mort-danceſtor, and therefore demands judgment, ſi de libero tenemento debeat hic ſine brevi reſpondere; and the judgment of the lords in parliament thereupon is entered in theſe words, viz. "Et quia actio de predicto tenemento petendo & "etiam ſuum recuperare, ſi quid habere debeat vel poſſit "eidem adæ per aſſiſam mortis anteceſſoris competere debet "nec eſt juri conſonum vel hactenus in curia iſta uſitat' "quod aliquis ſine lege communi, & brevi de cancellaria de "libero tenemento ſuo reſpondeat & maxime in caſu ubi "breve de cancellaria locum habere poteſt, dictum eſt "præfato adæ quod ſibi perquirat per breve de cancellaria, "ſi ſibi viderit expederire."

Rot. Parl. 13 R. 2. No. 10. Adam Chaucer preferred his petition to the king and lords in parliament, againſt ſir Robert Knolles, to be relieved touching a mortgage, which he ſuppoſed was ſatisfied, and to have reſtitution of his lands. The defendant appeared, and upon the ſeveral allegations on both ſides, the judgment is thus entered, viz. "Et apres les raiſons & les allegeances de l'un party & de "l'autre, y ſembles a ſeigneurs du parlement que le dit

"peti-

" petition ne eſtoit petition du parlement, deins que le " mattier en icel comprize dovit eſtre diſcuſs per le com- " mune ley. Et pur ceo agard ſuit que le dit Robert iroit " eut ſans jour & que le dit Adam ne prendoit rien per ſay " ſuit icy, eins que il ſueroit per le commune ley ſi il luy " ſembloit ceo faire." Where we may note, the words are " dovit eſtre," and not " poet eſtre diſcuſſe per le," &c.

Rot. Parl. 50 Edw. III. No. 43. A judgment being given againſt the biſhop of Norwich, for the archdeaconry of Norwich, in the common bench, the biſhop petitioned the lords in parliament, that the record might be brought into that houſe, and be reverſed for error. " Et quoy " a luy eſtoit finalement reſpondu per common aſſent des " ils les juſtices que ſi error y fuſt ſi aſcun a fine force per " le ley de Angleterre tiel error fuit voire en parlement " immediatement per voy de error ains en bank le roy, & " en nul part ailhors, mais ſi le caſe avenoit que error fuſt " fait en bank le roy adonque ceo ſerra amendes en par- " lement."

And let any man but look over the rolls of parliament, and the bundles of petitions in parliament, of the times of Edward I. Edward II. Edward III. Henry IV. Henry V. and Henry VI. he will find hundreds of anſwers of petitions in parliament, concerning matters determinable at common law, endorſed with anſwers to this, or the like effect, viz. " Suez vous a le commune ley; ſequatur ad " communem legem; perquirat breve in cancellaria ſi ſibi " viderit expedire; ne eſt petition du parlement, mande- " tur iſta petitio in cancellarium, vel cancellario, vel juſti- " ciariis de banco, vel theſaurario, & baronibus de ſcacca- " rio," and the like.

And theſe were not barely upon the bene placita of the lords, but were de jure, as appears by thoſe former judgments given in the lords houſe in parliament; and the reaſon is evident; firſt, becauſe if ſuch a courſe of extraordinary proceedings ſhould be had before the lords in the firſt inſtance, the party would loſe the benefit of his appeal by writ of error, according as the law allows; and that is the reaſon why even in a writ of error, or petition of error upon a judgment in any inferior court, it cannot go per ſal-

tem into parliament, till it has paſſed the court of king's bench; for that the firſt appeal is thither. Secondly, becauſe the ſubject would by that means loſe his trial per pares, and conſequently his attaint, in caſe of a miſtake in point of iſſue or damages: to both which he is intitled by law.

And although ſome petitions of this nature have been determined in that manner, yet it has been (generally) when the exception has not been ſtarted, or at leaſt not inſiſted upon: and one judgment in parliament, that caſes of that nature ought to be determined according to the courſe of the common law, is of greater weight than many caſes to the contrary, wherein the queſtion was not ſtirred: yea, even though it ſhould be ſtirred, and the contrary affirmed upon a debate of the queſtion, becauſe greater weight is to be laid upon the judgment of any court when it is excluſive of its juriſdiction, than upon a judgment of the ſame court in affirmance of it.

Now as to matters criminal, whether capital or not, they are determinable by the common law, and not otherwiſe; and in affirmance of that law, were the ſtatutes of magna charta, cap. 29. 5 Edw. III. cap. 9. 25 Edw. III. cap. 4. 29 Edw. III. cap. 3. 27 Edw. III. cap. 17. 38 Edw. III. cap. 9. & 40 Edw. III. cap. 3. The effect of which is, that no man ſhall be put out of his lands or tenements, or be impriſoned by any ſuggeſtion, unleſs it be by indictment or preſentment of lawful men, or by proceſs at common law (*a*).

And by the ſtatute of 1 Hen. IV. cap. 14. it is enacted, that no appeals be ſued in parliament at any time to come: this extends to all accuſations by particular perſons, and that not only of treaſon or felony, but of other crimes and miſdemeanors. It is true, the petition upon which that act was drawn up, begins with appeals of felony and treaſon; but the cloſe thereof, as alſo the king's anſwer, refers as well to miſdemeanors as matters capital; and becauſe this record will give a great light to this whole buſineſs, I will here ſet down the petition and the anſwer verbatim. Vide Rot. Parl. 1 Hen. IV. No. 144.

(*a*) Vide poſt. cap. 7.

Item,

" Item, Supplyont les commens que deſore en avant " nul appele de traiſon ne de autre felony quelconq; ſoit " accept ou receive en le parlement ains en vous autres " courts de dan voſtre realm dementiers que en vous dits " courts purra eſtre terminer come ad ote fait & uſe an- " cienement en temps de vous noble progeniteurs; et que " cheſcun perſon qui en temps a venir ſerra accuſe ou im- " peach en voſtre parlement ou en aſcuns des vos dits " courts per les ſeignors & commens di voſtre realm ou " per aſcun perſon & defence ou reſponſe a ſon accuſement " ou empeachment & ſur ſon reſponſe reaſonable record " jugement & tryal come de ancienement temps ad eſtre " fait & uſe per les bones leges de voſtre realm, nient ob- " ſtant que les dits empeachments ou accuſements ſoient " faits per les ſeigneurs ou commens de voſtre relme come " que de novel en temps de Ric. nadgarius roy ad eſtre fait " & uſe a contrar, a tres grand miſchief & tres grand ma- " leveys exemple de voſtre realm."

" Le roy voet que de cy en avant toutes les appeles de " choſes faits deins le relme ſoient tryez & terminez per " les bones leys faits en temps de tres noble progeniteurs " de noſtre dit ſeigneur le roy, et que touts les appeles de " choſes faits hors du realm, ſoient triez & terminez devant " le conſtable & marſhal de Angleterre, & que nul appele " ſoit fait en parlement deſore en aſcun temps a venir."

This is the petition and anſwer. The ſtatute, as drawn up hereupon, is general, and runs thus: " Item, pur plu- " ſieurs grands inconveniences & miſchiefs que pluſieurs " fait ont advenus per colour des pluſieurs appeles faits " deins le realm avant ces heurs ordain eſt & eſtabluz, " que deſore en avant touts appeles de choſes faits deins le " realm ſoient tries & termines per les bones leys de le " realm faits & uſes en temps de tres noble progeniteurs " de dit noſtre ſeigneur le roy; et que ils les appeles " de choſes faits hors du realm ſoient tries & termines " devant le conſtable & marſhal pur les temps eſteant; " et ouſter accordes eſt & aſſentus que nulls appeles

" ſoient deſore faits ou purſues en parlement en nul temps " avenir (*b*)."

Where we may obſerve, that though the petition expreſſes only treaſon and felony, yet the act is general againſt ALL appeals in parliament; and many times the purview of an act is larger than the preamble, or the petition, and ſo it is here: for the body of the act prohibits all appeals in parliament, and there was reaſon for it: for the miſchief, viz. appeals in parliament in the time of king Richard II. as in the petition is ſet forth, were not only of treaſon and felony, but of miſdemeanors alſo, as appears by that great proceeding; 11 Ric. II. againſt divers, by the lords appellants, and conſequently it was neceſſary to have the remedy as large as the miſchief. And I do not remember that after this ſtatute there were any appeals in parliament, either for matters capital or criminal, at the ſuit of any particular perſon or perſons.

It is true, impeachments by the houſe of commons, ſent up to the houſe of lords, were frequent as well after as before this ſtatute, and that juſtly, and with good reaſon; for that neither the act nor the petition ever intended to reſtrain them, but only to regulate them, viz. that the parties might be admitted to their defence to them; and as neither the words of the act nor the practice of after-times extended to reſtrain ſuch impeachments as were made by the houſe of commons, ſo neither do thoſe impeachments and appeals agree in their nature or reaſon; for appeals were nothing elſe but accuſations, either of capital or criminal miſdemeanors, made in the lords houſe by particular perſons; but an impeachment is made by the body of the houſe of commons, which is equivalent to an indictment pro corpore regni, and therefore is of another nature than an accuſation or appeal; only herein they agree, viz. impeachments in caſes capital againſt peers of the realm, have been ever tried and determined in the lords houſe; but impeachments againſt a commoner have not been uſual in the houſe

(*b*) Vide ſtat. 1 Hen. IV. cap. 132. 1 Mod. 148. Raſt. Ent. 14. and ſee Ruffh. edit. of ſtat. 49, 50. 1 v. 431.—See alſo 3 Inſt. 31.

of

of lords, unleſs preparatory to a bill, or to direct an indictment in the courts below: but impeachments at the proſecution of the houſe of commons, for miſdemeanors as well againſt a commoner as any other, have uſually received their determinations and final judgments in the houſe of lords; whereof there have been numerous precedents in all times, both before and ſince the ſaid act (*c*).

And thus much in general touching the great regard that parliaments and the kingdom have had, and that moſt juſtly, to the common law, and the great care they have had to preſerve and maintain it, as the common intereſt and birthright of the king and kingdom.

I ſhall now add ſome few words touching the ſtiles and appellations of the common law, and the reaſons of it: it is called ſometimes, by way of eminence, lex terræ, as in the ſtatute of magna charta, cap. 29. where certainly the common law is at leaſt principally intended by thoſe words, aut per legem terræ, as appears by the expoſition thereof in ſeveral ſubſequent ſtatutes, and particularly in the ſtatute 28 Edw. III. cap. 3. which is but an expoſition and declaration of that ſtatute: ſometimes it is called lex Angliæ, as in the ſtatute of Merton, cap. 9. Nolumus leges Angliæ mutare (*d*), &c. Sometimes it is called lex & conſuetudo regni, as in all commiſſions of oyer and terminer, and in the ſtatutes of 18 Edw. I. cap. . . and de quo warranto, and divers others; but moſt commonly it is called the common law; or, the common law of England, as in the ſtatute of articuli ſuper chartas, cap. 15. in the ſtatute 25 Edw. III. cap. 5. and infinite more records and ſtatutes.

Now the reaſon why it is called the common law, or what was the occaſion that firſt gave that determination to it, is variouſly aſſigned, viz.

Firſt, ſome have thought it to be ſo called by way of contradiſtinction to thoſe other laws that have obtained

(*c*) As to parliamentary impeachments, the ſtudent may conſult that moſt excellent and uſeful publication, "the Parliamentary "Hiſtory of England;" from whence he may derive ſufficient information. Vide alſo Monteſq. Sp. L. xi. 6. 1 Hal. H. P. C. 150. Rot. Parl. 4 Ed. III. n. 2. and 6. 2 Brad. Hiſt. 190. Seld. judic in parl. c. 1. Blac. Com. 1 v. 269. 4 v. 259. Seq. 399. & 12 & 13 W. III. c. 2

(*d*) See Seld. Differt. ad Fletam. 3 Inſt 208. and Barring. on ſtat. 44.

with-

within this kingdom; as, firſt, by way of contradiſtinction to the ſtatute law; thus a writ of entry ad Communem Legem, is ſo called in contradiſtinction to writs of entry in Caſu conſimili, and Caſu proviſo, which are given by act of parliament. Secondly, by way of contradiſtinction to particular cuſtomary laws: thus diſcents at common law, dower at common law, are in contradiſtinction to ſuch dowers and diſcents as are directed by particular cuſtoms. And thirdly, in contradiſtinction to the civil, canon, martial and military laws, which are in ſome particular caſes and courts admitted, as the rule of their proceedings.

Secondly, ſome have conceived, that the reaſon of this appellation was this, viz. In the beginning of the reign of Edward III. before the conqueſt, commonly called, Edward the confeſſor, there were ſeveral laws, and of ſeveral natures, which obtained in ſeveral parts of this kingdom, viz. The Mercian laws, in the counties of Glouceſter, Worceſter, Hereford, Warwick, Oxon, Cheſter, Salop and Stafford. The Daniſh laws, in the counties of York, Derby, Nottingham, Leiceſter, Lincoln, Northampton, Bedford, Bucks, Hertford, Eſſex, Middleſex, Norfolk, Suffolk, Cambridge and Huntington. The Weſt-Saxon laws, in the counties of Kent, Suſſex, Surrey, Berks, Southampton, Wilts, Somerſet, Dorſet, and Devon. (*e*)

This king, to reduce the kingdom as well under one law, as it then was under one monarchical government, extracted out of all thoſe provincial laws, one law to be obſerved through the whole kingdom: thus Ranulphus Ceſtrenſis, cited by ſir Henry Spelman in his Gloſſary, under the title Lex, ſays, Ex tribus his Legibus Sanctus Edvardus unam Legem—*&c.* and the ſame in totidem verbis, is affirmed in his hiſtory of the laſt year of the ſame king Edward. (Vide ibid. plura de hoc.) But Hoveden carries up the common laws, or thoſe ſtiled the confeſſor's laws, much further; for he in his hiſtory of Henry II. tells us, Quod iſtæ Leges prius inventæ & conſtitutæ erant tempore Edgari, Avi ſui, &c. (Vide Hoveden.) And poſſibly the grandfather might be the firſt collector of them into a body, and afterwards Edward might add to the compo-

(*e*) Blac. Com. 1 v. 65.

ſition,

ſition, and give it the denomination of the common law; but the original of it cannot in truth be referred to either, but is much more ancient, and is as undiſcoverable as the head of Nile: *(f)* of which more at large in the following chapter.

Thirdly, others ſay, and that moſt truly, that it is called the common law, becauſe it is the common municipal law or rule of juſtice in this kingdom: ſo that Lex Communis, or Jus Communis, is all one and the ſame with Lex Patriæ, or Jus Patrium; for although there are divers particular laws, ſome by cuſtom applied to particular places, and ſome to particular cauſes; yet that law which is common to the generality of all perſons, things and cauſes, and has a ſuperintendency over thoſe particular laws that are admitted in relation to particular places or matters, is Lex Communis Angliæ, as the municipal laws of other countries may be, and are ſometimes called, the common law of that country; as Lex Communis Norrica, Lex Communis Burgundica, Lex Communis Lombardica, &c. So that although all the former reaſons have their ſhare in this appellation, yet the principal cauſe thereof ſeems to be the latter: and hence ſome of the ancients called it Lex Communis, others Lex Patriæ; and ſo they were called in their confirmation by king William I. whereof hereafter *(g)*.

(f) Vide ante, cap. 1.

(g) See Dr. Taylor's Elements of the Civil Law—a book of infinite learning, and which the inquiſitive and induſtrious ſtudent will find of infinite advantage.

CHAP.

CHAP. IV.

Touching the original of the common law of England. [*Vide* Blackſtone's *Commentaries*, 1 *v.* 63 *to* 92 *incluſive.*]

THE kingdom of England, being a very ancient kingdom, has had many viciſſitudes and changes, eſpecially before the coming in of king William I. under ſeveral either conqueſts or acceſſions of foreign nations. For though the Britons were, as is ſuppoſed, the moſt ancient inhabitants, yet there were mingled with them, or brought in upon them, the Romans, the Picts, the Saxons, the Danes, and laſtly, the Normans; and many of thoſe foreigners were as it were incorporated together, and made one common people and nation; and hence ariſes the difficulty, and indeed moral impoſſibility, of giving any ſatisfactory or ſo much as probable conjecture, touching the original of the laws, for the following reaſons, viz.

Firſt, from the nature of laws themſelves in general, which being to be accommodated to the conditions, exigencies and conveniencies of the people, for or by whom they are appointed, (*a*) as thoſe exigencies and conveniencies do inſenſibly grow upon the people, ſo many times there grows inſenſibly a variation of laws, eſpecially in a long tract of time; and hence it is, that though for the purpoſe in ſome particular part of the common law of England, we may eaſily ſay, that the common law, as it is now taken, is otherwiſe than it was in that particular part or point in the time of Henry II. when Glanville wrote, or than it was in the time of Henry III. when Bracton wrote, yet it is not poſſible to aſſign the certain time when the change began; nor have we all the monuments or memorials, either of acts of parliament, or of judicial reſolutions, which might induce or occaſion ſuch alterations; for we have no authentic records of any acts of parliament before 9 Hen. III. and thoſe we have of that king's time, are but

(*a*) Inventæ ſunt leges ad ſalutem civium, civitatum que incolumitatem, vitamque hominum & quietam & beatam. Cic. de leg. l. 4. See Blac. Com. 4 *v.* 409.

few.

few. Nor have we any reports of judicial deciſions in any conſtant ſeries of time before the reign of Edward I. though we have the plea rolls of the times of Henry III. and king John, in ſome remarkable order. So that uſe and cuſtom, and judicial deciſions and reſolutions, and acts of parliament, though not now extant, might introduce ſome new laws, and alter ſome old, which we now take to be the very common law itſelf, though the times and preciſe periods of ſuch alterations are not explicitely or clearly known: but though thoſe particular variations and acceſſions have happened in the laws, yet they being only partial and ſucceſſive, we may with juſt reaſon ſay, they are the ſame Engliſh laws now, that they were 600 years ſince, in the general. As the Argonauts ſhip was the ſame when it returned home, as it was when it went out, though in that long voyage it had ſucceſſive amendments, and ſcarce came back with any of its former materials; and as Titius is the ſame man he was 40 years ſince, though phyſicians tell us, that, in a tract of ſeven years, the body has ſcarce any of the ſame material ſubſtance it had before.

Secondly, the ſecond difficulty in the ſearch of the antiquity of laws and their original, is in relation to that people unto whom the laws are applied, which in the caſe of England, will render many obſervables, to ſhew it hard to be traced. For,

Firſt, it is an ancient kingdom, and in ſuch caſes, though the people and government had continued the ſame ab origine (as they ſay the Chineſe did, till the late incurſion of the Tartars) without the mixture of other people, or laws; yet it were an impoſſible thing to give any certain account of the original of the laws of ſuch a people, unleſs we had as certain monuments thereof as the Jews had of theirs, by the hand of Moſes, (*b*) and that upon the following accounts, viz.

Firſt, we have not any clear and certain monuments of the original foundation of the Engliſh kingdom or ſtate, when, and by whom, and how it came to be planted. That which we have concerning it, is uncertain and traditional; and ſince we cannot know the original of the plant-

(*b*) Vide Blac. Com. 4 v. 409.

ing

ing of this kingdom, we cannot certainly know the original of the laws thereof, which may be well preſumed to be very near as ancient as the kingdom itſelf (*c*). Again, ſecondly, though tradition might be a competent diſcoverer of the original of a kingdom or ſtate, I mean oral tradition, yet ſuch a tradition were incompetent without written monuments to derive to us, at ſo long a diſtance, the original laws and conſtitutions of the kingdom; becauſe they are of a complex nature, and therefore not orally traducible to ſo great a diſtance of ages, unleſs we had the original or authentic tranſcript of thoſe laws as the Jews had of their law, or as the Romans had of their laws of the twelve tables engraven in braſs. (*d*) But yet further, thirdly, it is very evident to every day's experience, that laws, the further they go from their original inſtitution, grow the larger, and the more numerous: in the firſt coalition of a people, their proſpect is not great, they provide laws for their preſent exigence and convenience: but in proceſs of time, poſſibly their firſt laws are changed, altered or antiquated, as ſome of the laws of the twelve tables among the Romans were: but whatſoever be done touching their old laws, there muſt of neceſſity be a proviſion of new and other laws ſucceſſively anſwering to the multitude of ſucceſſive exigencies and emergencies, that in a long tract of time will offer themſelves; ſo that if a man could at this day have the proſpects of all the laws of the Britains before any invaſion upon them, it would yet be impoſſible to ſay, which of them were new, and which were old, and the ſeveral ſeaſons and periods of time wherein every law took its riſe and original, eſpecially ſince it appears, that in thoſe elder times, the Britains were not reduced to that civilized eſtate, as to keep the annals and memorials of their laws and government, as the Romans and other civilized parts of the world have done.

(*c*) The hiſtory of paſt events is immediately loſt or diſtigured when intruſted to memory, or to oral tradition. The only certain means, by which nations can indulge their curioſity in reſearches concerning their remote origin, is to conſider the language, the manners and the cuſtoms of their anceſtors, and to compare them with thoſe of the neighbouring nations.

(*d*) Vide Blac. Com. 1 v. 80. ſeq.

It

It is true, when the conqueſt of a country appears, we can tell when the laws of conquering people came to be given to the conquered. Thus we can tell that in the time of Henry II. when the conqueſt of Ireland had obtained a good progreſs, and in the time of king John, when it was compleated, the Engliſh laws were ſettled in Ireland: (*e*) but if we were upon this inquiry, what were the original of thoſe Engliſh laws that were thus ſettled there; we are ſtill under the ſame queſt and difficulty that we are now, viz. what is the original of the Engliſh laws.—For they that begin new colonies, plantations and conqueſts; if they ſettle new laws, and which the places had not before, yet for the moſt part, I don't ſay altogether, they are the old laws which obtained in thoſe countries from whence the conquerors or planters came.

Secondly, the ſecond difficulty of the diſcovery of the original of the Engliſh laws is this, that this kingdom has had many and great viciſſitudes of people that inhabited it, and that in their ſeveral times prevailed and obtained a great hand in the government of this kingdom, whereby it came to paſs, that there aroſe a great mixture and variety of laws: in ſome places the laws of the Saxons, in ſome places the laws of the Danes, in ſome places the laws of the ancient Britains, in ſome places, the laws of the Mercians, and in ſome places, or among ſome people (perhaps) the laws of the Normans: for although, as I ſhall ſhew hereafter, (*f*) the Normans never obtained this kingdom by ſuch a right of conqueſt, as did or might alter the eſtabliſhed laws of the kingdom; yet conſidering that king William I. brought with him a great multitude of that nation, and many perſons of great power and eminence, which were planted generally over this kingdom, eſpecially in the poſſeſſions of ſuch as had oppoſed his coming in, it muſt needs be ſuppoſed, that thoſe occurrences might eaſily have a great influence upon the laws of this kingdom, and ſecretly and inſenſibly introduce new laws, cuſtoms and uſages; (*g*) ſo that although the body and groſs of the law might continue the ſame, and ſo continue the ancient denomination that it firſt had, yet it muſt needs receive diverſe acceſſions

(*e*) Vide poſt. cap. 9. (*f*) Cap. 5, 6. (*g*) Blac. Com. 4 v. 409.

from

from the laws of thoſe people that were thus intermingled with the ancient Britains or Saxons; as the rivers of Severn, Thames, Trent, &c. though they continue the ſame denomination which their firſt ſtream had, yet have the acceſſion of divers other ſtreams added to them in the tracts of their paſſage which enlarge and augment them. And hence grew thoſe ſeveral denominations of the Saxon, Mercian, and Daniſh laws, out of which (as before is ſhewn) the confeſſor extracted his body of the common law; and therefore among all thoſe various ingredients and mixtures of laws, it is almoſt an impoſſible piece of chymiſtry to reduce every Caput Legis to its true original; as to ſay, this is a piece of the Daniſh, this of the Norman, or this of the Saxon or Britiſh law: neither was it, or indeed is it much material, which of theſe is their original; for 'tis very plain, the ſtrength and obligation, and the formal nature of a law, is not upon account that the Danes, or the Saxons, or the Normans, brought it in with them; but they became laws, and binding in this kingdom, by virtue only of their being received and approved here. (*b*)

Thirdly, a third difficulty ariſes from thoſe accidental emergencies that happened, either in the alteration of laws, or communicating or conveying of them to this kingdom: for firſt, the ſubdiviſion of the kingom into ſmall kingdoms under the heptarchy, did moſt neceſſarily introduce a variation of laws; becauſe the ſeveral parts of the kingdom were not under one common ſtandard, and ſo it will ſoon be in any kingdoms that are cantonized, and not under one common method of diſpenſation of laws, though under one and the ſame king. Again, the intercourſe and traffick with other nations, as it grew more or greater, did gradually make a communication and tranſmigration of laws from us to them, and from them to us. Again, the growth of Chriſtianity in this kingdom, and the reception of learned men from other parts, eſpecially from Rome, and the credit that they obtained here, might reaſonably introduce ſome new laws, and antiquate or abrogate ſome old ones

(*b*) Law may be conſidered as a treaty to which the members of the ſame community have agreed, and under which the magiſtrate and the ſubject continue to enjoy their rights, and to maintain the peace of ſociety.

that ſeemed leſs conſiſtent with the Chriſtian doctrines, and by this means, not only ſome of the judicial laws of the Jews, but alſo ſome points relating to, or bordering upon, or derived from the canon or civil laws, as may be ſeen in thoſe laws of the ancient kings, Ina, Alphred, Canutus, &c. collected by Mr. Lambard. (*i*)

Having thus far premiſed, it ſeems, upon the whole matter, an endleſs and inſuperable buſineſs to carry up the Engliſh laws to their ſeveral ſprings and heads, and to find out their firſt original; neither would it be of any moment or uſe if it were done: for whenever the laws of England, or the ſeveral Capita thereof began, or from whence or whomſoever derived, or what laws of other countries contributed to the matter of our laws; yet moſt certainly their obligation ariſes not from their matter, but from their admiſſion and reception, and authorization in this kingdom; and thoſe laws, if convenient and uſeful for the kingdom, were never the worſe, though they were deſumed and taken from the laws of other countries, ſo as they had their ſtamp of obligation and authority from the reception and approbation of this kingdom by virtue of the common law, of which this kingdom has been always jealous, eſpecially in relation to the canon, civil, and Norman law, for the reaſons hereafter ſhewn.

Paſſing therefore from this unſearchable inquiry, I ſhal deſcend to that which gives the authority, viz. The formal conſtituents, as I may call them, of the common law; and they ſeem to be principally, if not only, thoſe three, viz. firſt, the common uſage, or cuſtom, and practice of this kingdom, in ſuch parts thereof as lie in uſage or cuſtom. Secondly, the authority of parliament, introducing ſuch laws; and, thirdly, the judicial deciſions of courts of juſtice, conſonant to one another in the ſeries and ſucceſſions of time.

(*i*) That the civil law is intimately connected with the municipal juriſprudence in ſeveral countries of Europe, is a fact ſo well known, that it needs no illuſtration. Though our common law is ſuppoſed by ſome to form a ſyſtem perfectly diſtinct from the Roman code, and however we may affectedly boaſt of the diſtinction, yet it is evident that many of the ideas and maxims of the civil law are incorporated into the Engliſh juriſprudence. This is well illuſtrated by Mr. Barrington. Vide Obſerv. on ſtat. 76. ſeq.

Firſt, as to the firſt of theſe, uſage and cuſtom generally received, do Obtinere vim Legis, and is that which gives power ſometimes to the canon law, as in the eccleſiaſtical courts; ſometimes to the civil law, as in the admiralty courts; and again, controuls both, when they croſs other cuſtoms that are generally received in the kingdom. This is that which directs diſcents, has ſettled ſome ancient ceremonies and ſolemnities in conveyances, wills and deeds, and in many more particulars. And if it be enquired, what is the evidence of this cuſtom, or wherein it conſiſts, or is to be found? I anſwer, it is not ſimply an unwritten cuſtom, nor barely orally derived down from one age to another; but it is a cuſtom that is derived down in writing, and tranſmitted from age to age, eſpecially ſince the beginning of Edward I. to whoſe wiſdom the laws of England owe almoſt as much as the laws of Rome to Juſtinian. (*k*)

2. Acts of parliament. And here it muſt not be wondered at, that I make acts of parliament one of the authoritative conſtituents of the common law, though I had before contradiſtinguiſhed the one from the other; for we are to know, that although the original or authentic tranſcripts of acts of parliament are not before the time of Henry III. and many that were in his time are periſhed and loſt; yet certainly ſuch there were, and many of thoſe things that we now take for common law, were undoubtedly acts of parliament, though now not to be found of record (*l*). And if in the next age, the ſtatutes made in the time of Henry III. and Edward I. were loſt, yet even thoſe would paſs for parts of the common law, and indeed, by long uſage and the many reſolutions grounded upon them, and by their great antiquity, they ſeem even already to be incorporated with the very common law; and that this is ſo, may appear, though not by records, for we have none ſo ancient, yet by an authentical and unqueſtionable hiſtory, wherein a man may, without much difficulty, find, that many of thoſe capitala legum that are now uſed and taken

(*k*) See Blac. Com. 1 v. 68.

(*l*) Vide the caſe of Collins and Blantern. Wilſ. par. 2. fo. 348, 351. and ſee the firſt chapter of this hiſtory, note (*e*).

for

for common law, were things enacted in parliaments or great councils under William I. and his predeceſſors, kings of England, as may be made appear hereafter. But yet, thoſe conſtitutions and laws being made before time of memory, do now obtain, and are taken as part of the common law and immemorial cuſtoms of the kingdom; and ſo they ought now to be eſteemed, though in their firſt original they were acts of parliament.

3. Judicial deciſions. It is true, the deciſions of courts of juſtice, though by virtue of the laws of this realm they do bind, as a law between the parties thereto, as to the particular caſe in queſtion, till reverſed by error or attaint, yet they do not make a law properly ſo called, (for that only the king and parliament can do); yet they have a great weight and authority in expounding, declaring, and publiſhing what the law of this kingdom is, eſpecially when ſuch deciſions hold a conſonancy and congruity with reſolutions and deciſions of former times; and though ſuch deciſions are leſs than a law, yet they are a greater evidence thereof than the opinion of any private perſons, as SUCH, whatſoever;—

Firſt, becauſe the perſons who pronounce thoſe deciſions, are men choſen by the king for that employment, as being of greater learning, knowledge, and experience in the laws than others. Secondly, becauſe they are upon their oaths to judge according to the laws of the kingdom. Thirdly, becauſe they have the beſt helps to inform their judgments. Fourthly, becauſe they do ſedere pro tribunali, and their judgments are ſtrengthened and upheld by the laws of this kingdom, till they are by the ſame law reverſed or avoided (*m*).

Now judicial deciſions, as far as they refer to the laws of this kingdom, are for the matter of them of three kinds:

(*m*) Vide Blac. Com. 1 v. 69. cap. 8. 13 W. III. cap. 2. 1 ſeq. Id. 267. Forteſc. de laud. Geo. III. c. 23. and De Lolme, cap. 8. Seld. Review of Tith. cap. 8.

First, they are either ſuch as have their reaſons ſingly in the laws and cuſtoms of the kingdom, as, who ſhall ſucceed as heir to the anceſtor, what is the ceremony requiſite for paſſing a freehold, what eſtate, and how much ſhall the wife have for her dower? And many ſuch matters wherein the ancient and expreſs laws of the kingdom give an expreſs deciſion, and the judge ſeems only the inſtrument to pronounce it; and in theſe things, the law or cuſtom of the realm is the only rule and meaſure to judge by, and in reference to thoſe matters the deciſions of courts are the conſervatories and evidences of thoſe laws.

Secondly, or they are ſuch deciſions, as by way of deduction and illation upon thoſe laws are framed or deduced; as for the purpoſe, whether of an eſtate thus or thus limited, the wife ſhall be endowed? whether if thus or thus limited, the heir may be barred? And infinite more of the like complicated queſtions. And herein the rule of deciſion is, firſt, the common law and cuſtom of the realm, which is the great ſubſtratum that is to be maintained; and then authorities or deciſions of former times in the ſame or the like caſes, and then the reaſon of the thing itſelf.

Thirdly, or they are ſuch as ſeem to have no other guide but the common reaſon of the thing, unleſs the ſame point has been formally decided, as in the expoſition of the intention of clauſes in deeds, wills, covenants, *&c.* where the very ſenſe of the words, and their poſitions and relations, give a rational account of the meaning of the parties; and in ſuch caſes the judge does much better herein, than what a bare grave grammarian or logician, or other prudent man could do; for in many caſes there have been former reſolutions, either in point, or agreeing in reaſon or analogy with the caſe in queſtion; or perhaps alſo, the clauſe to be expounded is mingled with ſome terms or clauſes that require the knowledge of the law, to help out with the conſtruction or expoſition: both which do often happen in the ſame caſe, and therefore it requires the knowledge of the law to render and expound ſuch clauſes and ſentences; and doubtleſs a good common lawyer is the beſt expoſitor

expoſitor of ſuch clauſes, &c. Vide Plowden 122, to 130, 140, &c.

CHAP. V

How the common law of England *ſtood at and for ſome time after the coming in of king* William I.

IT is the honour and ſafety, and therefore the juſt deſire of kingdoms that recognize no ſuperior but God, that their laws have theſe two qualifications, viz. firſt, that they be not dependent upon any foreign power; for a dependency in laws derogates from the honour and integrity of the kingdom, and from the power and ſovereignty of the prince thereof. Secondly, that they taſte not of bondage or ſervitude; for that derogates from the dignity of the kingdom, and from the liberties of the people thereof.

In relation to the former conſideration, the kings of this realm, and their great councils, have always been jealous and careful, that they admitted not any foreign power, (eſpecially ſuch as pretended authority to impoſe laws upon other free kingdoms or ſtates) nor to countenance the admiſſion of ſuch laws here, as were derived from ſuch a power,

Rome, as well ancient as modern, pretended a kind of univerſal power and intereſt; the former by their victories, which were large, and extended even to Britain itſelf; and the latter upon the pretence of being univerſal biſhop or vicar general, in all matters eccleſiaſtical; ſo that upon pretence of the former, the civil law, and upon pretence of the latter, the canon law was introduced, or pretended to ſome kind of right in the territories of ſome abſolute princes, and among others here in England: but this kingdom has been always very jealous of giving too much countenance to either of thoſe laws, and has always ſhewn

(z) Thus the practice and deciſions of courts, acquire the authority of laws; every proceeding is conducted by ſome fixed and determinate rule; and the beſt and moſt effectual precautions are taken for the impartial application of rules to particular caſes.

a juſt indignation and reſentment againſt any incroachments of this kind, either by the one law or the other. It is true, as before is ſhewn, that in the admiralty and military courts, the civil law has been admitted, and in the eccleſiaſtical courts, the canon law has been in ſome particulars admitted. But ſtill they carry ſuch marks and evidences about them, whereby it may be known that they bind not, nor have the authority of laws from themſelves, but from the authoritative admiſſion of this kingdom.

And, as thus the kingdom, for the reaſons before given, never admitted the civil or the canon law to be the rule of the adminiſtration of common juſtice in this kingdom; ſo neither has it endured any laws to be impoſed upon the people by any right of conqueſt, as being unſuitable to the honour or liberty of the Engliſh kingdom, to recognize their laws as given them at the will and pleaſure of a conqueror. And hence it was, that although the people unjuſtly aſſiſted king Henry IV. in his uſurpation of the crown, yet he was not admitted thereunto, until he had declared, that he claimed not as a conqueror (*a*), but as a ſucceſſor (*b*), only he reſerved to himſelf the liberty of extending a pretence of conqueſt againſt the Scroops that were ſlain in battle againſt him; which yet he durſt not reſt upon without a confirmation in parliament. Vide Rot. Parl. 1 H. 4. No. 56. & Pars 2. Ibid. No. 17. [A]

And upon the like reaſon it was, that king William I. though he be called the conqueror, and his attaining the crown here, is often in hiſtory, and in ſome records, called conqueſtus Angliæ; yet in truth it was not ſuch a conqueſt as did, or could alter the laws of this kingdom, or impoſe laws upon the people per modum conqueſtus, or jure belli: and therefore, to wipe off that falſe imputation upon our laws, as if they were the fruit or effect of a conqueſt, or carried in them the badge of ſervitude to the will of the conqueror, which notion ſome ignorant and prejudiced perſons have entertained; I ſhall rip up and lay open this

(*a*) His right as a conqueror was never avowed, it was only inſinuated

(*b*) See Knyghton 2757. Henry patched up a title in the beſt manner he could, and in the end he left himſelf, in the eyes of men of ſenſe, no foundation of right, but his poſſeſſion.

whole

whole buſineſs from the bottom, and to that end enquire into the following particulars, viz.

Firſt, of the thing called conqueſt, what it is, when attained, and the rights thereof.

Secondly, of the ſeveral kinds of conqueſt, and their effects, as to the alteration of laws by the victor.

Thirdly, how the Engliſh laws ſtood at the entry of king William I.

Fourthly, by what title he entred, and whether by ſuch a right of conqueſt as did, or could, alter the Engliſh laws.

Fifthly, whether de facto there was any alteration of the ſaid laws, and by what means, after his coming in.

Firſt, touching the firſt of theſe, viz. conqueſt, what it is, when attained, and the rights thereof. It is true, that it ſeems to be admitted as a kind of law among all nations, that in caſe of a ſolemn war between ſupreme princes, the conqueror acquires a right of dominion, as well as a property over the things and perſons that are fully conquered (*c*); and the reaſons aſſigned are principally theſe, viz.

Firſt, becauſe both parties have appealed to the higheſt tribunal that can be, viz. the trial by war; wherein the great Judge and Sovereign of the world, the Lord of Hoſts, ſeems in a more eſpecial manner than in other caſes, to decide the controverſy. Secondly, becauſe unleſs this ſhould be a final deciſion, mankind would be deſtroyed by endleſs broils, wars and contentions; therefore, for the preſervation of mankind, this great deciſion ought to be final, and the conquered ought to acquieſce in it (*d*). Thirdly, becauſe if this ſhould not be admitted, and be as it were, by

(*c*) In the opinion of Grotius, he may impoſe ſubjection upon the whole body, whether it be a ſtate, or only part of a ſtate; and whether that ſubjection be civil, mixt, or deſpotical. De jure belli ac Pacis l. 8. c. 8. Seneca makes uſe of this argument in the controverſy *de Olynthio*.—Vide Controverſ, 2 v. Contr. xxxiv. 390. edit. Gron. Major.

(*d*) See the Diſſertation of Cocceius, de jure victoriæ diverſo a jure belli, ſect 23. but Freuer has attempted to refute the opinion of Cocceius, in his notes upon Puffendorf, de Offic. Hom. & Civ. l. 2. c. 16. ſect. 13.

the tacit conſent of mankind accounted a lawful acquiſition, there would not be any ſecurity or peace under any government: for by the various revolutions of dominion acquired by this means, have been, and are to this day the ſucceſſions of kingdoms and ſtates preſerved. What was once the Romans, was before that the Græcians, and before them the Perſians, and before the Perſians, the Aſſyrians; and if this juſt victory were not allowed to be a firm acqueſt of dominion, the preſent poſſeſſors would be ſtill obnoxious to the claim of the former proprietors, and ſo they would be in a reſtleſs ſtate of doubts, difficulties and changes, upon the pretenſion of former claims: therefore, to cut off this inſtability and unſettledneſs in dominion and property, it would ſeem that the common conſent of all nations has tacitly ſubmitted, that acquiſition by right of conqueſt, in a ſolemn war between perſons not ſubjects of each other by bonds of allegiance or fidelity, ſhould be allowed as one of the lawful titles of acquiring dominion over the perſons, places and things ſo conquered.

But whatever be the real truth or juſtice of this poſition, yet we are much at a loſs touching the things in hypotheſi, viz. whether this be the effect of every kind of conqueſt? whether the war be juſt or unjuſt? what are the requiſites to the conſtituting of a juſt war (*e*)? who are the perſons that may acquire? and what are the ſolemnities requiſite for that acqueſt? but above all, the greateſt difficulty is, when there ſhall be ſaid, ſuch a victory as acquires this right? Indeed if there be a total deletion (*f*) of every perſon of the oppoſing party or country, then the victory is complete, becauſe none remains to call it in queſtion. But ſuppoſe they are beaten in one battle, may they not rally again? or if the greater part be ſubdued, may not the leſſer keep their ground? or if they do not at the preſent, may they not in the next age regain their liberty? or if they be quiet for a time, may they not, as they have opportunity, renew their pretenſions? and although the vic-

(*e*) Of a juſt and ſolemn war, according to the right of nations, ſee Grot. l. 3. c. 3.

(*f*) I believe ſir Matthew Hale is the only author in our language, who makes uſe of the ſubſtantive *deletion*. It ſhould ſeem to mean the act of raſing or blotting out; or, in common parlance, deſtruction.

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tor, by his power, be able to quell and ſuppreſs them, yet he is beholden to his ſword for it; and the right that he got by his victory before, would not be ſufficient, without a power and force to eſtabliſh and ſecure him againſt new troubles. And on the other ſide, if thoſe few ſubdued perſons can by force regain what they once had a pretence to, a former victory will be but a weak defence; and if it would, they would have the like pretence to a claim of acqueſt by victory over him, as he had over them.

It ſeems therefore a difficult thing to determine in what indiviſible moment this victory is ſo compleat, that Jure Belli, the acqueſt of dominion is fully gotten; and therefore victors uſe to ſecure themſelves againſt diſputes of that kind, and as it were to under-pin their acqueſt Jure Belli, that they might not be loſt by the ſame means whereby they were gained, by the continuation of eternal forces of ſtanding armies, caſtles, garriſons, munitions, and other acts of power and force, ſo as thereby to over-bear and prevent an ordinary poſſibility of the prevailing of the conquered or ſubdued people, againſt the conqueror or victor. He that lays the weight of his title upon victory or conqueſt, rarely reſts in it as a compleat conqueſt, till he has added to it ſomewhat of conſent or faith of the conquered, (g) ſubmitting voluntarily to him; and then, and not till then, he thinks his title ſecure, and his conqueſt compleat: and indeed, he has no reaſon to think his title can be otherwiſe ſecure; for where the title is merely force or power, his title will fail, if the conquered can with like force or power over-match his, and ſo regain their former intereſt or dominion.

Now this conſent is of two kinds, either expreſſed, or implied. An expreſs conſent is, when after a victory, the party conquered, do expreſly ſubmit themſelves to the victors, either ſimply or abſolutely; by dedition, yielding themſelves, giving him their faith and their allegiance; or elſe under certain pacts, conventions, agreements, or capitulations; as when the ſubdued party, either by themſelves,

(g) In ſuch caſe, it ſhould ſeem, that the acquiſition is lawful, and that whether the war be juſt, or unjuſt. Vide Grot. l. 3. c. 8. ſect. 1. note 1. l. 3. c. 19. ſect. 11. note 1. See alſo Puffendorf, l. 8. c. 8. ſect. 1.

or

or by ſubſtitutes, or delegates by them choſen, do yield their faith and their allegiance to the victor upon certain pacts or agreements between them; as for holding or continuing their religion, their laws, their form of civil adminiſtration, &c.

And thus, though force were perhaps the occaſion of this conſent, yet in truth 'tis content only that is the true proximate and fixed foundation of the victor's right; which now no longer reſts barely upon external force, but upon the expreſs conſent and pact of the ſubdued people, and conſequently this pact or convention is that which is to be the immediate foundation of that dominion; and upon a diligent obſervation of moſt acqueſts gotten by conqueſt, or ſo called, we ſhall find this to be the concluſion of almoſt all victories; they end in deditions (*b*) and capitulations, and faith given to the conqueror, whereby oftentimes the former laws, privileges, and poſſeſſions are confirmed to the ſubdued, without which the victors ſeldom continue long or quiet in their new acqueſts, without extream expence, force, ſeverity and hazard.

An implied conſent is, when the ſubdued do continue for a long time quiet and peaceable under the government of the victor; accepting his government, ſubmitting to his laws, taking upon them offices and employments under him, and obeying and owning him as their governor, without oppoſing him, or claiming their former right. This ſeems to be a tacit acceptance of, and aſſent to him; and though this is gradual, and poſſibly no determinate time is ſtinted, wherein a man can ſay, this year, or this month, or this day, ſuch a tacit conſent was compleated and concluded; for circumſtances may make great variations in the ſufficiency of the evidence of ſuch an aſſent; yet by a long and quiet tract of peaceable ſubmiſſion to the laws and government of the victor, men may reaſonably conjecture, that the conquered have relinquiſhed their purpoſe of regaining by force, what by force they loſt.

(*b*) Sir Matthew Hale alſo ſtands alone in the application of this ſubſtantive. It ſeems to imply the act of yielding up any thing—a ſurrender, or ceſſion.

But

But ſtill all this is intended of a lawful conqueſt by a foreign prince or ſtate, and not an uſurpation by a ſubject, either upon his prince or fellow ſubjects; for ſeveral ages and diſcents do not purge the unlawfulneſs of ſuch an uſurpation.

Secondly, concerning the ſeveral kinds of conqueſts, and their effects, as to the alteration of laws by the victor. There ſeems to be a double kind of conqueſt, which induces a various conſideration touching the change of laws, viz. Victoria in regem & populum, & victoria in regem tantum. The conqueſt over the people or country, is when the war is denounced by a prince or ſtate foreign, and no ſubject, and when the intention and denunciation of the war is againſt the king and people or country, and the pretenſion of title is by the ſword, or Jure Belli; ſuch were moſt of the conqueſts of ancient monarchs, viz. The Aſſyrian, Perſian, Græcian, and Roman conqueſts; and in ſuch caſes, the acquiſitions of the victor were abſolute and univerſal; he gained the intereſt and property of the very ſoil of the country ſubdued; which the victor might, at his pleaſure, give, ſell or arrent: he gained a power of aboliſhing or changing their laws and cuſtoms, and of giving new, or of impoſing the law of the victor's country. But although this the conqueror might do, yet a change of the laws of the conquered country was rarely univerſally made, eſpecially by the Romans: who, though in their own particular colonies, planted in conquered countries, they obſerved the Roman law, which poſſibly might by degrees, without any rigorous impoſition, gain and inſinuate themſelves into the conquered people, and ſo gradually obtain, and inſenſibly conform them, at leaſt ſo many of them as were conterminous (*i*) to the colonies and garriſons, to the Roman laws; yet they rarely made a rigorous and univerſal change of the laws of the counquered country, unleſs they were ſuch as were foreign and barbarous, or altogether inconſiſtent with the victor's government: but in other things, they commonly indulged unto the conquered,

(*i*) Here again, I believe ſir Matthew is ſingular. Were the fourth vowel omitted, which ſeems to be the only letter uſed to anglicize this adjective, the word would then be as in its original Latin, *conterminus*.

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the laws and religion of their country upon a double account, viz.

First, on account of humanity; thinking it a hard and over-ſevere thing, to impoſe preſently upon the conquered, a change of their cuſtoms, which long uſe had made dear to them. And, ſecondly, upon the account of prudence; for the Romans, being a wiſe and experienced people, found that thoſe indulgences made their conqueſts the more eaſy, and their enjoyments thereof the more firm; whereas a rigorous change of the laws and religion of the people would render them in a reſtleſs and unquiet condition, and ready to lay hold of any opportunity of defection or rebellion, to regain their ancient laws and religion, which ordinary people count moſt dear to them; (though at this day, the indulgence of a Paganiſh religion is not uſed to be allowed by any Chriſtian victor, as is obſerved in Calvin's caſe in the ſeventh report;) and to give one inſtance for all, it was upon this account, that though the Romans had wholly ſubdued Syria and Paleſtina, yet they allowed to the inhabitants, the Jews, &c. the uſe of their religion and laws, ſo far forth as conſiſted with the ſafety and ſecurity of the victor's intereſt: and therefore, though they reſerved to themſelves the cognizance of ſuch cauſes as concerned themſelves, their officers or revenues; and ſuch caſes as might otherwiſe diſturb the ſecurity of their empire, as treaſons, inſurrections, and the like; yet 'tis evident they indulged the people of the Jews, &c. to judge by their own law, not only of ſome criminal proceedings, but even of capital in ſome caſes, as appears by the hiſtory of the goſpels, and acts of the apoſtles.

But ſtill this was but an indulgence, and therefore was reſumable by the victor, unleſs there intervened any capitulation between the conqueror and the conquered, to the contrary, which was frequent; eſpecially in thoſe caſes, when it was not a compleat conqueſt, but rather a dedition upon terms and capitulations, agreed between the conqueror and the conquered; wherein uſually the yielding party ſecured to themſelves, by the articles of their dedition, the enjoyment of their laws and religion; and then by the laws of nature and of nations, both which oblige to the obſervation

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of faith and promiſes, thoſe terms and capitulations, were to be obſerved. Again, ſecondly, when after a full conqueſt, the conquered people reſumed ſo much courage and power as began to put them into a capacity of regaining their former laws and liberties: this commonly was the occaſion of terms and capitulations between the conquerors and conquered. Again, thirdly, when by long ſucceſſion of time, the conquered had either been incorporated with the conquering people, whereby they had worn out the very marks and diſcriminations between the conquerors and conquered; and if they continued diſtinct, yet by a long preſcription, uſage and cuſtom, the laws and rights of the conquered people were in a manner ſettled, and the long permiſſion of the conquerors amounted to a tacit conceſſion or capitulation, for the enjoyment of their laws and liberties.

But of this more than enough is ſaid, becauſe it will appear in what follows, that William I. never made any ſuch conqueſt of England.

Secondly; therefore I come to the ſecond kind of conqueſt, viz. that which is only victoria in regem: and this is where the conqueror either has a real right to the crown or chief government of a kingdom, or at leaſt has, or makes ſome pretence or claim thereunto; and, in purſuance uf ſuch claim, raiſes war, and by his forces obtains what he ſo pretends a title to. Now this kind of conqueſt does only inſtate the victor in thoſe rights of government, which the conquered prince, or that prince to whom the conqueror pretends a right of ſucceſſion, had; whereby he becomes only a ſucceſſor Jure Belli, but not a victor or conqueror upon the people; and therefore has no more right of altering their laws, or taking away their liberties or poſſeſſions, than the conquered prince, or the prince to whom he pretends a right of ſucceſſion, had; for the intention, ſcope and effect of his victory, extends no further than the ſucceſſion, and does not at all affect the rights of the people. The conqueror is, as it were, the plaintiff, and the conquered prince is the defendant, and the claim is, a claim of title to the crown; and becauſe each of them pretends a right to the ſovereignty, and there is no other

competent trial of the title between them, they put themſelves upon the great trial by battle (*k*); wherein there is nothing in queſtion touching the rights of the people, but only touching the right of the crown; and that being decided by the victory, the victor comes in as a ſucceſſor, and not jure victoriæ, as in relation to the people's rights; the moſt ſacred whereof are their laws and religion.

Indeed, thoſe that do voluntarily aſſiſt the conquered prince, commonly undergo the ſame hazard with him, and do, as it were, put their intereſt upon the hazard and iſſue of the ſame trial; and therefore commonly fall under the ſame ſeverity with the conquered, at leaſt *de facto*; becauſe, perchance the victor thinks he cannot be ſecure without it: but yet uſage, and indeed common prudence, makes the conquerors uſe great moderation and diſcrimination, in relation to the aſſiſtants of the conquered prince; and to extend this ſeverity only to the eminent and buſy aſſiſtants of the conquered, and not to the gregarii, or ſuch as either by conſtraint or by neceſſity, were enforced to ſerve againſt him; and as to thoſe alſo, on whom they exerciſe their power, it has been rarely done jure belli aut victoriæ, but by a judiciary proceeding, as in caſes of treaſon; becauſe now the great title by battle has pronounced for the right of the conqueror, and at beſt no man muſt dare to ſay otherwiſe now, whatſoever debility was in his pretenſion or claim. We ſhall ſee the inſtances hereof in what follows.

Thirdly, as to the third point, how the laws of England ſtood at the entry of king William I. It ſeems plain, that at the time of his entry into England, the laws, commonly called the laws of Edward the confeſſor, were then the ſtanding laws of the kingdom (*l*). Hoveden tells us, in a digreſſion under his hiſtory of king Henry II. that thoſe laws were originally put together by king Edgar, who was the confeſſor's grandfather, viz. "Verum tamen poſt "mortem ipſius regis Edgari uſq; ad coronationem ſancti "regis Edvardi quod tempus continet ſexaginta & ſeptem "annos prece (vel pretio) leges ſopitæ ſunt & jus præter-"miſſæ ſed poſtquam rex Edvardus in regno fuit ſublima-

(*k*) Vide poſt, cap. 6. note (*a*). (*l*) Vide ante, cap. 1. note (*g*).

"tus

" tus concilio baronum Angliæ legem annos ſexaginta &
" ſeptem ſopitam, excitavit & confirmavit, & ea lex ſic
" confirmata vocata eſt lex ſancti Edvardi, non quod ipſe
" prius inveniſſet eam ſed cum prætermiſſa fuiſſet & obli-
" vioni penitus dedita a morte avi ſui regis Edgari qui
" primus inventor ejus fuiſſe dicitur uſque ad ſua tempora,
" viz. ſexaginta & ſeptem annos." And the ſame paſſage
" in totidem verbis" is in the hiſtory of Litchfield, cited in Sir Robert Twiſden's prologue to the laws of king William I. But although poſſibly thoſe laws were collected by king Edgar, yet it is evident, by what is before ſaid, they were augmented by the confeſſor, by that extract of laws before-mentioned; which he made out of that three-fold law, that obtained in ſeveral parts of England, viz. the Daniſh, the Mercian, and the Weſt-Saxon laws.

This manual (as I may call it) of laws, ſtiled the confeſſor's laws, was but a ſmall volume, and contains but few heads; being rather a ſcheme, or directory, touching ſome method to be obſerved in the diſtribution of juſtice, and ſome particular proceedings relative thereunto, eſpecially in matters of crime; as appears by the laws themſelves, which are now printed in Mr. Lambart's Saxon laws, p. 133. and other places; yet the Engliſh were very zealous for them, no leſs, or otherwiſe than they are at this time, for the great charter; inſomuch, that they were never ſatisfied till the ſaid laws were reinforced and mingled for the moſt part with the coronation oath of king William I. and ſome of his ſucceſſors.

And this may ſerve ſhortly touching this third point, whereby we ſee that the laws that obtained at the time of the entry of king William I. were the Engliſh laws, and principally thoſe of Edward the confeſſor.

Fourthly, the fourth particular is, the pretenſions of king William I. to the crown of England, and what kind of conqueſt he made; and this will be beſt rendered and underſtood by producing the hiſtory of that buſineſs, as it is delivered over to us by the ancient hiſtorians that lived in or near that time: the ſum, or totum whereof, is this.

King Edward the confeſſor having no children, nor like to have any, had three perſons related to him, whom he princi-

principally favoured, viz. firſt, Edgar Ætheling, the ſon of Edward, the ſon of Edmond Ironſide, Matt. Paris, anno 1066. Edmundus autem latus ferreum rex naturalis de ſtirpe regum genuit Edwardum & Edwardus genuit Edgarum cui de jure debebatur regnum Anglorum. Secondly, Harold, the ſon of Goodwin, earl of Kent, the confeſſor's father-in-law, he having married earl Goodwin's daughter: and thirdly, William duke of Normandy, who was allied to the confeſſor thus, viz. William was the ſon of Robert (*m*), the ſon of Richard duke of Normandy, which Richard was brother unto the confeſſor's mother. Vide Hoveden, ſub initio anni primi Willielmi primi.

There was likewiſe a great familiarity, as well as this alliance, between the confeſſor and duke William; for the confeſſor had often made conſiderable reſidences in Normandy: and this gave a fair expectation to duke William of ſucceeding him in this kingdom. And there was alſo, at leaſt pretended, a promiſe made him by the confeſſor, that duke William ſhould ſucceed him in the crown of England [B]; and becauſe Harold was in great favour with the king, and of great power in England, and therefore the likelieſt man by his aſſiſtance to advance, or by his oppoſition to hinder, or temperate, the duke's expectation, there was a contract made between the duke and Harold in Normandy in the confeſſor's life-time; that Harold ſhould, after the confeſſor's death, aſſiſt the duke in obtaining the crown of England (*n*). Shortly after which the confeſſor died, and then ſtepped up the three competitors to the crown, viz.

1. Edgar Ætheling, who was indeed favoured by the nobility, but being an infant, was overborn by the power of Harold, who thereupon began to ſet up for himſelf: whereupon Edgar, with his two ſiſters, fled into Scotland; where he, and one of his ſiſters, dying without iſſue, Mar-

(*m*) By Harlotta, the daughter of a tanner in Falaiſe. Brompton, 910. William was ſo little aſhamed of his birth, that he aſſumed the appellation of baſtard in ſome of his letters and charters. Spelm. Gloſſ. in verb. *baſtardus*. Camden in *Richmondſhire*.

(*n*) Vide W. Malmſb. 93. Hoveden, 449. Brompton, 947. Gul. Gemet. l. 7. c. 31. H. Hunt. 366. Ingulf, 68. Wace, 459, 460. MS. Penes Carte, 354.

garet,

garet, his other ſiſter and heir, married Malcolm, king of Scots; from whence proceeded the race of the Scottiſh kings.

Second, Harold, who having at firſt raiſed a power under pretence of ſupporting and preſerving duke William's title to this kingdom, and having by force ſuppreſſed Edgar, he thereupon claimed the crown to himſelf; and pretending an adoption, or bequeſt of the kingdom unto him by the confeſſor, he forgot his promiſe made to duke William, and uſurped the crown; which he held but the ſpace of nine months and four days. Hoveden. [C]

Thirdly, William duke of Normandy, who pretended a promiſe of ſucceſſion by the confeſſor, and a capitulation or ſtipulation by Harold for his aſſiſtance; and had, it ſeems, ſo far intereſted the pope in favour of his pretenſions, that he pronounced for William againſt both the others. [D]

Hereupon the duke makes his claim to the crown of England; gathered a powerful army; and came over; and upon the 14th of October, Anno 1067, gave Harold battle, and overthrew him at that place in Suſſex, where William afterwards founded Battle-abby, in memory of that victory; (o) and then he took upon him the government of the kingdom, as king thereof: and upon Chriſtmas following was ſolemnly crowned at Weſtminſter by the archbiſhop of York; (p) and he declared at his coronation, that he claimed the crown not jure belli, but jure ſucceſſionis. Brompton gives us this account thereof, "cum "nomen tyranni exhorreſceret & nomen legitimi principis "induere vellet petiit conſecrari;" and accordingly, ſays the ſame author, the archbiſhop of York, in reſpect of ſome

(o) Vide Gul. Gemet. 288. Chron. Sax. 189. M. Weſt. 226. M. Paris, 9. Diceto, 482. This convent was freed by him from all epiſcopal juriſdiction. Monaſt. Ang. tom. 1. p. 311, 312.

(p) William pretending that Stigand, the primate, had obtained his pall in an irregular manner from pope Benedict IX who was himſelf an uſurper, refuſed to be conſecrated by him; and therefore conferred that honour on Aldred, archbiſhop of York. Gul Pictav. 205. Ingulf. 69. Malmeſ. 102. Hoveden, 450. M. Weſt. 245. Flor. Wig. 635. M. Paris, 4. Anglia Sacra, vol. 1. p. 248. Alur. Bever. 127. Stigand was poſſeſſed of ſuch influence and authority over the Engliſh, as might be dangerous to a new eſtabliſhed monarch. Eadmer. 6.

preſent incapacity in the archbiſhop of Canterbury, " mu-
" nus hoc adimplevit ipſumque Gulielmum Regem ad jura
" Eccleſiæ Anglicanæ tuenda & conſervanda populumque
" ſuum recte regendum, & Leges rectas Statuendum, Sa-
" cramento Solemniter adſtrinxit;" (q) and thereupon he took the homage of the nobility (r).

This being the true, though ſhort account of the ſtate of that buſineſs, there neceſſarily follows from thence theſe plain and unqueſtionable conſequences.

Firſt, that the conqueſt of king William I. was not a conqueſt upon the country, or people, but only upon the king of it, in the perſon of Harold, the uſurper; for William I. came in upon a pretence of title of ſucceſſion to the confeſſor; and the proſecution and ſucceſs of the battle he gave to Harold, was to make good his claim of ſucceſſion, and to remove Harold, as an unlawful uſurper upon his right; which right was now decided in his favour, and determined by that great trial by battle. [See Blac. Com. 1 v. 199. Seld. of tithes, c. 8.]

Secondly, that he acquired in conſequence thereof no greater right than what was in the confeſſor, to whom he pretended a right of ſucceſſion; and therefore, could no more alter the laws of the kingdom upon the pretence of conqueſt, than the confeſſor himſelf might; or than the duke himſelf could have done, had he been the true and rightful ſucceſſor to the crown, in point of deſcent from the confeſſor; neither is it material, whether his pretence were true or falſe; or whether, if true, it were available or not, to entitle him to the crown; for whatſoever it was, it was ſufficient to direct his claim, and to qualify his victory ſo, that the jus belli thereby acquired, could be only victoria in regem, ſed non in populum; and put him only in

(q) Vide Order. Vital. 503. Malmſb. 271.

(r) The king, thus poſſeſſed of the throne by a pretended deſtination of king Edward, and by an irregular election of the people, but ſtill more by the power of his arms, retired from London to Berking in Eſſex; and there received the ſubmiſſions of all the nobility, who had not attended his coronation. Gul. Pictav. 208. Order. Vitalis, 503.

the

the ſtate, capacity and qualification of a ſucceſſor to the king, and not as conqueror of the kingdom.

Thirdly, and as this his antecedent claim kept his acqueſt within the bounds of a ſucceſſor, and reſtrained him from the unlimited bounds and power of a conqueror; ſo his ſubſequent coronation, and the oath by him taken, is a further unqueſtionable demonſtration, that he was reſtrained within the bounds of a ſucceſſor, and not enlarged with the latitude of a victor; for at his coronation he bound himſelf by a ſolemn oath, to preſerve the rights of the church, and to govern according to the laws; and not abſolutely and unlimitedly according to the will of a conqueror.

Fourthly, that if there were any doubt whether there might be ſuch a victory as might give a pretenſion to him, of altering laws, or governing as a conqeror; yet to ſecure from that poſſible fear, and to avoid it, he ends his victory in a capitulation; namely, he takes the ancient oath of a king unto the people, and the people reciprocally giving or returning him that aſſurance that ſubjects ought to give their prince, by performing their homage to him as their king, declared him by the victory he had obtained over the uſurper, to be the ſucceſſor of the confeſſor: and conſequently, if there might be any pretence of conqueſt over the peoples rights, as well as over Harold's, yet the capitulation or ſtipulation removes the claim or pretence of a conqueror, and enſtates him in the regulated capacity and ſtate of a ſucceſſor. And upon all this it is evident, that king William I. could not abrogate or alter the ancient laws of the kingdom, any more than if he had ſucceeded the confeſſor as his lawful heir, and had acquired the crown by the peaceable courſe of deſcent, without any ſword drawn. [E]

And thus much may ſuffice, to ſhew that king William I. did not enter by ſuch a right of conqueſt, as did or could alter the laws of this kingdom.

Therefore I come to the laſt queſtion I propoſed to be conſidered, viz. whether de facto there was any thing done by king William I. after his acceſſion to the crown, in reference either to the alteration or confirmation of the laws; and how and in what manner the ſame was done: and this being a narrative of matters of fact, I ſhall divide into

two inquiries, viz. Firſt, what was done in relation to the lands and poſſeſſions of the Engliſh; and ſecondly, what was done in relation to the laws of the kingdom in general; for both of theſe will be neceſſary to make up a clear narrative touching the alteration or ſuſpenſion, confirmation or execution of the laws of this kingdom by him.

Firſt, therefore touching the former, viz. what was done in relation to the lands and poſſeſſions of the Engliſh. Theſe two things muſt be premiſed, viz. firſt, a matter of right, or law; which is this, that in caſe this had been a conqueſt upon the kingdom, it had been at the pleaſure of the conqueror to have taken all the lands of the kingdom into his own poſſeſſion; to have put a period to all former titles; to have cancelled all former grants; and to have given, as it were, the date and original to every man's claim, ſo as to have been no higher nor ancienter than ſuch his conqueſt, and to hold the ſame by a title derived wholly from and under him. I do not ſay, that every abſolute conqueror of a kingdom will do thus; but that he may if he will and has power to effect it.

Secondly, the ſecond thing to be premiſed is, a matter of fact, which is this; that duke William brought in with him a great army of foreigners, that expected a reward of their undertaking; and therefore were doubtleſs very craving and importunate for gratifications to be made them by the conqueror. (s) Again, it is very probable, that of the Engliſh themſelves, there were perſons of very various conditions and inclinations; ſome perchance did adhere to the duke, and were aſſiſtant to him openly, or at leaſt under-hand, towards the bringing him in; and thoſe were ſure to enjoy their poſſeſſions privately and quietly when the duke prevailed. Again, ſome did, without all queſtion, adhere to Harold, and thoſe in all probability were ſeverely dealt with, and diſpoſſeſſed of their lands, unleſs they could make their peace. Again, poſſibly there

(s) William beſtowed the forfeited eſtates on the moſt powerful of his captains, and eſtabliſhed funds for the payment of his ſoldiers. Gul. Pict. 208.—His military inſtitutions were thoſe of a tyrant; at leaſt of one, who reſerved to himſelf, whenever he pleaſed, the power of aſſuming that character. Vide H. Hunt, 369. M. Weſt, 225. Malmſb. 104.

were

were others who aſſiſted Harold, partly out of fear and compulſion; yet thoſe, poſſibly, if they were of any note or eminence, fared little better than the reſt. Again, there were ſome that probably ſtood neuter, and meddled not; and thoſe, though they could not expect much favour, yet they might in juſtice expect to enjoy their own. Again, it muſt needs be ſuppoſed, that the duke having ſo great an army of foreigners; ſo many ambitious and covetous minds to be ſatisfied; ſo many to be rewarded in point of gratitude; and after ſo great a concuſſion as always happens upon the event of a victory, it muſt needs, upon thoſe and ſuch like accounts, be evident to any man that conſiders things of this nature, that there were great outrages and oppreſſions committed by the victor's ſoldiers and their officers; many falſe accuſations made againſt innocent perſons; great diſturbances and evictions of poſſeſſions; many right owners being unjuſtly thrown out, and conſequently many occupations and uſurpations of other men's rights and poſſeſſions; and a long while before thoſe things could be reduced to any quiet and regular ſettlement. [F]

Theſe general obſervations being premiſed, we will now ſee what de facto was done in relation to men's poſſeſſions, in conſequence of this victory of the duke.

Firſt, it is certain that he took into his hands all the demeſne lands of the crown which were belonging to Edward the confeſſor, at the time of his death; and avoided all the diſpoſitions and grants thereof made by Harold, during his ſhort reign; and this might be one great end of his making that noble ſurvey in the fourth year of his reign, called generally Doomſday-read, in ſome records; as Rot. Winton, &c.—thereby to aſcertain what were the poſſeſſions of the crown in the time of the confeſſor; and thoſe he entirely reſumed: and this is the reaſon why in ſome of our old books it is ſaid, ANCIENT DEMESNE is that which was held by king William the conqueror; and in others 'tis ſaid, ancient demeſne is that which was held by king Edward the confeſſor; and both true in their kind; in this reſpect, viz. that whatſoever appeared to be the con-

ſeſſor's at the time of his death, was aſſumed by king William into his own poſſeſſion. [G]

Secondly, it is alſo certain, that no perſon ſimply, and quatenus an Engliſh man, was diſpoſſeſſed of any of his poſſeſſions; conſequently their land was not pretended unto, as acquired jure belli; which appears moſt plainly by the following evidences, viz.

Firſt, that very many of thoſe perſons that were poſſeſſed of lands in the time of Edward the confeſſor, and ſo returned upon the book of Doomſday, retained the ſame unto them and their deſcendants; and ſome of their deſcendants retain the ſame poſſeſſions to this day; which could not have been, if preſently, jure belli ac victoriæ univerſalis, the lands of the Engliſh had been veſted in the conqueror. And again,

Secondly, we do find, that in all times, even ſuddenly after the conqueſt, the charters of the ancient Saxon kings WERE PLEADED AND ALLOWED; and titles made and created by them, to lands, liberties, franchiſes and regalities, affirmed and adjudged under William I. Yea, when that exception was offered, THAT BY THE CONQUEST THOSE CHARTERS HAD LOST THEIR FORCE, yet thoſe claims were allowed; as in 7 E. 3. *fines*, mentioned by Mr. Selden, in his notes upon Eadmerus; which could not be, if there had been ſuch a conqueſt as had veſted all men's rights in the conqueror.

Thirdly, many recoveries were had ſhortly after this conqueſt, as well by heirs, as ſucceſſors, of the ſeiſin of their predeceſſors before the conqueſt. We ſhall take one or two inſtances for all; namely, that famous record apud Pinendon, by the archbiſhop of Canterbury, in the time of king William I. of the ſeiſin and title of his predeceſſors before the conqueſt: ſee the whole proceſs and proceedings thereupon, in the end of Mr. Selden's notes upon Eadmerus, and Spelman's Gloſſary, title Drenches. Upon theſe inſtances, and much more that might be added, it is without contradiction, that the rights and inheritances of the Engliſh, qua tales, were not abrogated or impeached by this conqueſt; but continued, notwithſtanding, the ſame; for, as is before obſerved, it was jure belli quoad regem, ſed non quoad populum.

But to deſcend to ſome particulars: the Engliſh perſons that the conqueror had to deal with were of three kinds, viz. firſt, ſuch as adhered to him againſt Harold the uſurper; and, without all queſtion, thoſe continued the poſſeſſion of their lands, and their poſſeſſions were rather encreaſed by him, than any way diminiſhed. Secondly, ſuch as adhered to Harold, and oppoſed the duke, and fought againſt him; and doubtleſs, as to thoſe, the duke after his victory uſed his power, and diſpoſſeſſed them of their eſtates: which is uſual upon all concluſions and events of this kind, upon a double reaſon; firſt, to ſecure himſelf againſt the power of thoſe that oppoſed him, and to weaken them in their eſtates, that they ſhould not afterwards be enabled to make head againſt him. And, ſecondly, to gratify thoſe that aſſiſted him, and to reward their ſervices in that expedition; and to make them firm to his intereſt, which was now twiſted with their own: for it can't be imagined, but that the conqueror was aſſiſted with a great company of foreigners; ſome that he favoured; ſome that had highly deſerved for their valour; ſome that were neceſſitous ſoldiers of fortune; and others that were either ambitious or covetous: all whoſe deſires, deſerts, or expectations, the conqueror had no other means to ſatisfy, but by the eſtates of ſuch as had appeared open enemies to him; and doubtleſs, many innocent perſons ſuffered in this kind, under falſe ſuggeſtions and accuſations; which occaſioned great exclamations by the writers of thoſe times againſt the violences and oppreſſions which were uſed after this victory. And, thirdly, ſuch as ſtood neuter, and meddled not on either ſide during the controverſy: and doubtleſs, for ſome time after this great change, many of thoſe ſuffered very much, and were hardly uſed in their eſtates, eſpecially ſuch as were of the more eminent ſort (*t*).

Gervaſius Tilburienſis, (who wrote in the time of Henry II.) libro 1. cap. Quid Murdrum & quare ſic dictum, gives us a large account of what he had traditionally learned touching this matter, to this effect, viz. "Poſt regni con-" quiſitionem & perduellium ſubjectionem, &c. nomine

(*t*) Vide note (F) on this chapter.

" autem ſucceſſionis a temporibus ſubactæ gentis nihil ſibi " vendicarent, &c." i. e. after the conqueſt of the kingdom, and ſubjection of the rebels, when the king himſelf and his great men had ſurveyed their new acquiſitions, ſtrict enquiry was made, who there were that, fighting againſt the king, had ſaved themſelves by flight: from theſe, and the heirs of ſuch as were ſlain in battle, fighting againſt him, all hopes of ſucceſſion, or of poſſeſſing their eſtates, were loſt; for the people being ſubdued, they held their lives as a favour, &c.

But Gervaſe, as he ſpeaks ſo liberally in relation to the conqueſt, and the ſubacta gens, as he terms us; ſo it ſhould ſeem, he was in great meaſure miſtaken in this relation: for it is moſt plain, that thoſe that were not engaged viſibly in the aſſiſtance of Harold, were not, according to the rules of thoſe times, diſabled to enjoy their poſſeſſions, or make title of ſucceſſion to their anceſtors, or tranſmit to their poſterity as formerly, though poſſibly ſome oppreſſions might be uſed to particular perſons here and there to the contrary. And this appears by that excellent monument of antiquity, ſet down in ſir H. Spelman's Gloſſary, in the title of Drenches or Drenges, which I ſhall here tranſcribe, viz.

" Edwinus de Sharborne, et quidam alii qui ejecti fue-
" runt & terris ſuis abierunt ad conqueſtorem & dixerunt
" ei, *quod nunquam ante conqueſtum, nec in conqueſtum, nec*
" *poſt, fuerunt contra regem ipſum in* CONCILIO, AUT IN
" AUXILIO *ſed tenuerunt ſe in pace*, et hoc parati ſunt pro-
" bare qualiter rex vellet ordinare, per quod idem rex fa-
" cit inquiri per totam Angliam ſi ita fuit, quod quidem
" probatum fuit, propter quod idem rex præcepit ut om-
" nes illi qui ſic tenuerunt ſe in pace in forma prædicta
" quod ipſi REHABERENT omnes terras & dominationes
" ſuas adeo integre & in pace ut unquam habuerent vel
" tenuerunt ante conqueſtum ſuum, et quod ipſi in poſte-
" rum vocarentur drenges."

But it ſeems the poſſeſſions of the church were not under this diſcrimination, for they being held not in right of the perſon, but of the church, were not ſubject to any confiſcation by the adherence of the poſſeſſor to Harold the

uſurper:

uſurper (*u*): and therefore, though it ſeems Stigand archbiſhop of Canterbury, at the coming in of William I. had been in ſome oppoſition againſt him, which probably might be the true cauſe why he performed not the office of his coronation, which of right belonged to him, though ſome other impediments were pretended (*x*), and might alſo poſſibly be the reaſon why a conſiderable part of his poſſeſſions were granted to Odo, biſhop of Bayonne; yet they were afterwards recovered by Lanfrank, his ſucceſſor, at Pinendon, in pleno comitatu, ubi rex præcepit totum comitatum abſque mora conſidere, & homines comitatus omnes Francigenos & præcipue Anglos in antiquis legibus & conſuetudinibus peritos, in unum convenire.

To this may be added thoſe ſeveral grants and charters made by king William I. mentioned in the hiſtory of Ely, and in Eadmerus, for reſtoring to biſhopricks and abbies ſuch lands, or goods, as had been taken away from them, viz.

" Willielmus Dei gratia rex Anglorum, Lanfranco " archiepiſcopo cantuar' & Galfrido epiſcopo conſtantiarum " & Roberto comiti de ou & Richardo filio comitis Gilberti " & Hugoni de Monteforti, ſuiſque aliis proceribus regni " Angliæ ſalutem. Summonete vicecomites meos ex meo " præcepto & ex parte mea eis dicite ut reddant epiſcopa- " tibus meis & abbatiis totum dominium omneſque domi- " nicas terras quas de dominio epiſcopatuum meorum, & " abbatarium, epiſcopi mei & abbates eis vel lenitate ti- " more vel cupiditate dederunt vel habere conſenſerunt vel " ipſi violentia ſua inde abſtraxerunt, & quod hactenus " injuſte poſſiderunt de dominio eccleſiarum mearum. Et " niſi reddiderint ſicut eos ex parte mea ſummonebitis, vos " ipſos velint nolint, conſtringite reddere; et quod ſi qui-

(*u*) William, however, retained the church in great ſubjection, as well as his lay ſubjects: and would allow none, of whatever character, to diſpute his ſovereign will and pleaſure.

(*x*) The crimes alledged againſt Stigand were mere pretences; his ruin, however, was not only reſolved on, but proſecuted with great ſeverity. Vide Hoveden, 453. Diceto, 482. Knyghton, 2345. Anglia Sacra, v. 1. 5, 6. Ypod. Neuſt. 438. Vide alſo Eadmerus in initio libri.

" libet

" libet alius vel aliquis veſtrum quibus hanc juſtitiam im-
" poſui ejuſdem querelæ fuerit reddat ſimiliter quod de
" domino epiſcopatuum vel abbatiarum mearum habuit
" ne propter illud quod inde aliquis veſtrum habebit, minus
" exerceat ſuper meos vicecomites vel alios, quicunque te-
" neant dominium eccleſiarum mearum, quod præcipio,
" &c.

" Willielmus rex Anglor' omnibus ſuis fidelibus ſuis &
" vicecomitibus in quorum vicecomitatibus abbatia de Heli
" terras habet ſalutem. Præcipio ut abbatia pred. habeat
" omnes conſuetudines ſuas ſcilicet ſaccham & ſocham toll
" & team & infanganetheof, hamſocua, & grithbrice fith-
" wite & ferdwite infra burgum & extra & omnes alias
" forisfacturas in terra ſua ſuper ſuos homines ſicut habuit
" die qua rex Edwardus fuit vivus & mortuus, & ſicut
" mea juſſione dirationatæ apud keneteford, per plures
" ſcyras ante meos barones, viz. Galfridum conſtantientem
" ep. & Baldewine abbatem, &c. teſte Rogere Bigot.

" Willielmus rex Angl. Lanfranco archiepo,' & Rogero
" comiti Moritoniæ, & Galfrido conſtantien epo ſalutem.
" Mando vobis & præcipio ut iterum faciatis congregari
" omnes ſcyras quæ interfuerunt placito habito de terris
" eccleſia de Heli, antequam mea conjux in Normaniam
" noviſſime veniret, cum quibus etiam ſint de baronibus
" meis, qui competenter adeſſe poterint & prædicto placito
" interfuerint & qui terras ejuſdem eccleſiæ tenent; quibus
" in unum congregatis eligantur plures de illis Anglis qui
" ſciunt quomodo terræ jacebant præfatæ eccleſiæ die qua
" rex Edwardus obiit, & quod inde dixerint ibidem jure
" jurando teſtentur; quo facto reſtituentur eccleſiæ terræ
" quæ in dominico ſuo erant die obitus regis Edwardi;
" exceptis his quas homines clamabant me ſibi dediſſe;
" illas vero literis mihi ſignificate quæ ſint, & qui eas te-
" nent; qui autem tenent theinlandes quæ proculdubio
" debent teneri de eccleſia faciant concordiam cum abbate
" quam meliorem poterint, & ſi noluerunt terræ remaneant
" ad eccleſiam, hoc quoque detinentibus ſocham & ſaccam
" fiat, &c.

Willielmus rex Anglorum, Lanfranco Archiepiſc', & G. Epiſc. & R. Comiti M. ſalutem, &c. Defendite ne Remigius Epiſcopus novas conſuetudines requirat intra in-

" ſulam

ſulam de Heli, nolo enim quod ibi habeat niſi illud quod anteceſſor ejus habebat tempore regis Edwardi ſcilicet qua die ipſe rex mortuus eſt. Et ſi remig. epiſcopus inde placitare voluerit placitet inde ſicut feciſſet tempore regis Edw. & placitum iſtum ſit in veſtra præſentia; de cuſtodia de Norguic abbatem ſimeonem quietum eſſe demittite; ſed ibi municionem ſuam conduci faciat & cuſtodiri. Facite remanere placitum de terris quas calumniantur Willielmus de ou, & Radulphus filius Gualeranni, & Robertus Gernon; ſi inde placitare noluerint ſicut inde placitaſſent tempore regis Edwardi, & ſicut in eodem tempore abbatia conſuetudines ſuas habebat, volo ut eas omnio faciatis habere ſicut abbas per chartas ſuas, & per teſtes ſuos eas deplacitare poterit.

I might add many more charters to the foregoing, and more eſpecially thoſe famous charters in Spelman's councils, vol. 2. fol. 14. & 165. whereby it appears, that king William I. communi concilio, & concilio archiepiſcoporum, epiſcoporum & abbatum, & omnium principum & baronum regni, inſtituted the courts for holding pleas of eccleſiaſtic cauſes, to be ſeparate and diſtinct from thoſe courts that had juriſdiction of civil cauſe (*y*). Sed de his pluſquam ſatis.

And thus I conclude the point I firſt propounded, viz. how king William I. after his victory, dealt with the poſſeſſions of the Engliſh; whereby it appears that there was no pretence of an univerſal conqueſt, or that he was a victor in populum; neither did he claim the title of Engliſh lands upon that account, but only made uſe of his victory thus far, to ſeize the lands of ſuch as had OPPOSED him: which is univerſal in all caſes of victories, though without the pretence of conqueſt.

Secondly, therefore I come to the ſecond general queſtion, viz. what was done in relation to the laws. It is very plain, that the king, after his victory, did, as all wiſe princes would have done, endeavour to make a ſtricter union between England and Normandy; and, in order

(*y*) Vide Blac. Com. 4 v. 415. 4 Inſt. 259 Wilk. LL. Angl. Sax. See alſo Seld. in Ead. p. 6. l. 24. 292. and Black. Com. 3 v. 63.

there-

thereunto, he endeavoured to bring in the French inſtead of the Saxon language, then uſed in England: deliberavit (ſays Holcot) quomodo linguam Saxonicam poſſit deſtruere, & Anglicam & Normanicam idiomate concordare & ideo ordinavit quod nullus in curia regis placitaret NISI IN LINGUA GALLICA, &c. (z). From whence aroſe the practice of pleading in our courts of law in the Norman or French tongue, which cuſtom continued till the ſtatute of 36 E. 3. c. 15.

And as he thus endeavoured to make a community in their language, ſo poſſibly he might endeavour to make the like in their laws, and to introduce the Norman laws into England, or as many of them as he thought convenient; and it is very probable, that after the victory, the Norman nobility and ſoldiers were ſcattered through the whole kingdom, and mingled with the Engliſh; which might poſſibly introduce ſome of the Norman laws and cuſtoms inſenſibly into this kingdom: and to that end the conqueror did induſtriouſly mingle the Engliſh and Normans together, ſhuffling the Normans into Engliſh poſſeſſions here, and putting the Engliſh into poſſeſſions in Normandy, and making marriages among them, eſpecially between the nobility of both nations.

This gave the Engliſh a ſuſpicion, that they ſhould ſuddenly have a change of their laws before they were aware of it. But it fell out much better: for firſt, there ariſing

(z) William had entertained the difficult project of totally aboliſhing the Engliſh language; and, for that purpoſe, he ordered, that in all the ſchools throughout the kingdom, the youth ſhould be inſtructed in the French tongue; a practice which was continued from cuſtom till after the reign of Edward III. and was never indeed totally diſcontinued in England. The pleadings in the ſupreme courts of judicature were in French. 36 Ed. III. c. 15. Seld. Spicileg. ad Eadmer. 189. Fort. laud. leg. Angl. c. 48. The deeds were often drawn in the ſame language: the laws were compoſed in that idiom. Ingulf. 71, 88. Chron. Rothom. A. D. 1066.—No other tongue was uſed at court.—It became the language of all faſhionable ſocieties, and the Engliſh themſelves, aſhamed of their own country, affected to excel in that foreign dialect. From this attention of William, and from the great foreign dominions long annexed to the crown of England, proceeded that great mixture of French which is at preſent to be found in the Engliſh tongue, and which compoſes the greateſt and beſt part of our language.

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ſome danger of a defection of the Engliſh, countenanced by the archbiſhop of York in the north, and Frederick, abbot of St. Albans in the ſouth; the king, by the perſwaſions of Lanfrank, archbiſhop of Canterbury, pro bono pacis apud Berkhamſtead juravit ſuper animas reliquias ſancti Albani tactiſque ſacroſanctis evangeliis (miniſtrante juramento abbate Frederico) ut bonas & approbatas antiquas regni leges quas ſancti & pii Angliæ reges ejus anteceſſores, & maxime rex Edvardus ſtatuit INVIOLABILITER OBSERVARET; et ſic pacificati ad propria læti receſſerunt. Vide Mat. Paris in vita Frederici abbatis ſancti Albani.

But although now, upon this capitulation, the ancient Engliſh laws were confirmed, and namely, the laws of St. Edward the confeſſor; yet it appeared not what thoſe laws were: and therefore, in the fourth year of his reign, we are told by Hoveden, (*a*) in a digreſſion he makes in his hiſtory under the reign of king Henry II. and alſo in the chronicle of Lithfield.

Willielmus rex, anno quarto regni ſui conſilio baronum ſuorum fecit ſummonari per univerſos conſulatos Angliæ, Anglos nobiles & ſapientes & ſua lege eruditos ut eorum jura & conſuetudines ab ipſis audiret, electis igitur de ſingulis totius patriæ comitatibus viri duodecim, jurejurando confirmaverunt ut quoad poſſint recto tramite neque ad dextram neque ad ſiniſtram partem divertentes legum ſuarum conſuetudinem & ſancitam patefacerent nihil prætermittentes nihil addentes, nihil prævaricando mutantes, &c. And then ſets down many of thoſe ancient laws approved and confirmed by the king, and COMMUNE CONCILIUM; wherein it appears, that he ſeems to be moſt pleaſed with thoſe laws that came under the title of LEX DANICA, as moſt conſonant to the Norman cuſtoms. Quo auditu mox univerſi compatrioti qui leges dixerint triſtes effecti, uno miniſterio deprecati ſunt quatenus permitteret leges ſibi proprias & conſuetudines antiquas habere in quibus vixerunt patres, & ipſi in iis nati & nutriti ſunt, quia durum valde ſibi foret ſuſcipere leges ignotas, & judicare de iis quæ neſciebant; rege vero ad flectendum ingrato exiſtente, tandem eum perſecuti

(*a*) Vide Hoveden, 600. See alſo Ingulf, 88. Brompton, 982. Knyghton, 2355.

ſunt

ſunt deprecantes quatenus pro anima regis Edvardi qui eas ſub diem ſuum eis conceſſerat barones & regnum & cujus orant leges non aliorum extraneorum cogere quam ſub legibus perſeverare patriis; unde conſilio habito præcatui baronem tandem acquievit, &c.

Gervaſius Tilburienſis, who lived near that time, ſpeaks ſhortly, and to the purpoſe, thus: propoſitis legibus Anglicanis ſecundum triplicitam earum diſtinctionem, i. e. merchenlage, Weſtſaxon-lage, & Dane-lage-quaſdam earum reprobans quaſdam autem approbans illis tranſmarinas legis neuſtriæ quas ad regni pacem tuendam efficaſiſſime videbantur, adjecit.

So that by this, there appears to have been a double collection of laws, viz.

Firſt, the laws of the confeſſor, which were granted and confirmed by king William, and are alſo called the laws of king William; which are tranſcribed in Mr. Selden's notes upon Eadmerus, page 173. the title whereof is thus, viz. Hæ ſunt leges & conſuetudines quas Willielmus rex conceſſit univerſo populo Angliæ poſt ſubactam terram eadem ſunt quas Edvardus rex cognatus ejus obſervavit ante eum: and theſe ſeem to be the very ſame that Ingulfus mentions to have been brought from London, and placed by him in the abbey of Crowland in the fifteenth year of the ſame king William; attuli eadem vice mecum Londini in meum monaſterium legum volumen, &c.

Secondly, there were certain additional laws at that time eſtabliſhed, which Gervaſius Tilburienſis calls, leges neuſtriæ que efficaciſſimæ videbantur ad tuendam regni pacem; which ſeems to be included in thoſe other laws of king William tranſcribed in the ſame notes upon Eadmerus, pag. 189, 193, &c. which indeed were principally deſigned for the eſtabliſhment of king William in the throne, and for the ſecuring of the peace of the kingdom; eſpecially between the Engliſh and Normans, as appears by theſe inſtances, viz.

The law, de murdro, or the common fine for a Norman or Frenchman ſlain, and the offender not diſcovered: the law for the oath of allegiance to the king; the introduction of the trial by ſingle combat, which many learned men have thought was not in uſe here in England before William

liam I. (*b*) and the law touching knights ſervice, which Bracton, Lib. 2. ſuppoſes to be introduced by the conqueror, viz. Quod omnes comites milites & ſervientes & univerſi liberi homines totius regni habeant & teneant ſe ſemper bene in armis & in equis ut decet & quod ſint ſemper prompti & bene parati ad ſervitium ſuum integrum nobis explendum & peragendum cum ſemper opus affuerit ſecundum quod nobis de feodo debent & tenementis ſuis de jure facere & ſicut illis ſtatuimus per commune concilium totius regni prædicti, & illis dedimus & conceſſimus in feodo jure hæreditario. Wherein we may obſerve, that this conſtitution ſeems to point at two things, viz. The aſſizing of men for arms, which was frequent under the title de aſſidenda ad arma, and is afterwards particularly enforced and rectified by the ſtatute of Winton, 13 Ed. 1. and next of conventional ſervices, reſerved by tenures upon grants made out of the crown or knights ſervice; called in Latin, forinſecum, or regale ſervitium. [H.] vide poſt cap. xi. note *k*.

And note, that theſe laws were not impoſed ad libitum regis, but they were ſuch as were ſettled per commune concilium regni, and poſſibly at that very time when twelve out of every county were returned to aſcertain the confeſſor's laws, as before is mentioned out of Hoveden; which appears to be AS SUFFICIENT AND EFFECTUAL A PARLIAMENT AS EVER WAS HELD IN ENGLAND (*c*).

By all which it is apparent, firſt, that William I. did not pretend, nor indeed could he pretend, notwithſtanding this nominal conqueſt, to alter the laws of this kingdom, without common conſent, in communi concilio regni, or in parliament. And, ſecondly, that if there could be any pretence of any ſuch right, or if in that turbulent time ſomething of that kind had happened; yet by all thoſe ſolemn capitulations, oaths, and conceſſions, that pretence was wholly avoided, and the ancient laws of the kingdom ſettled, and were not to be altered, or added unto, at the pleaſure of the conqueror, WITHOUT CONSENT IN PARLIAMENT.

(*b*) Vide LL. Will. cap. 68. Blac. Com. 4 v. 419. and ſee note (*a*) on cap. 6. of this hiſtory.

(*c*) The ſtudent will find a conciſe and pertinent account of the alterations of our laws, under the reign of this ambitious and politic prince, in the laſt chapter of the fourth volume of Mr. Juſtice Blackſtone's Commentaries.

In

In the ſeventeenth year of his reign, or, as ſome ſay, the fifteenth, he began that great ſurvey, recorded in two books, called the great Doomſday book, and little Doomſday book, and finiſhed it in the twentieth year of his reign, anno Domini 1086, (*d*) as appears by the learned preface of Mr. Selden to Eadmerus, and indeed by the books themſelves. The original record of which is ſtill extant, remaining in the cuſtody of the vice-chamberlains of his majeſty's exchequer. This record contains a ſurvey of all the ancient demeſn lands of the kingdom, and contains in many manors, not only the tenants names, with the quantity of lands and their values, but likewiſe the number and quality of the reſiants or inhabitants, with divers rights, privileges, and cuſtoms claimed by them; and being made and found by verdict or preſentment of juries in every hundred, or diviſion, upon their oaths, there was no receeding from or avoiding what was written in this record: and therefore, as Gervaſius Tilburienſis ſays, page 41. Ob hoc nos eundem librum Judiciarium nominamus; non quod in eo de propoſitis aliquibus dubiis feratur ſententia, ſed quod ab eo ſicut ab ultimo die judicii non licet ulla ratione diſcedere. [I]

And thus much ſhall ſuffice touching the fifth general head; namely, of the progreſs made after the coming-in of king William, relating to the laws of England, their eſtabliſhment, ſettlement, and alteration. If any one be minded to ſee what this prince did in reference to eccleſiaſtics, let him conſult Eadmerus, and the learned notes of Mr. Selden upon it; eſpecially page 167, 168, &c. where he ſhall find how this king divided the epiſcopal conſiſtory, from the county court, and how he reſtrained the clergy and their courts from exerciſing eccleſiaſtical juriſdiction upon tenants in capite. [See alſo Blac. Com. 4 v. 415, 416.]

(*d*) At the end of Doomſday book the date, or year, viz. 1086, is written in a large coeval hand. Ma[illegible]. Exc. 1 v. 296. And ſee Wright's Ten. 52, 53.

ADDI-

ADDITIONAL NOTES

TO THE

FIFTH CHAPTER.

NOTE [A] p. 70.

IT is without queſtion that Henry IV. claimed not the crown as a conqueror (though he was very much inclined ſo to do (*a*) but as a ſucceſſor, by deſcent, from the right line of the blood royal.

In order to this he ſet up a ſhew of two titles: the one upon the pretence of being the firſt of the blood royal in the intire male line, whereas the duke of Clarence left only one daughter Philippa; from which female branch, by a marriage with Edmond Mortimer earl of March, the houſe of York deſcended: the other by reviving an exploded rumour, firſt propagated by John of Gaunt, that Edmund earl of Lancaſter (to whom Henry's mother was heireſs) was in reality the elder brother of king Edward I. though his parents, on account of his perſonal deformity, had impoſed him on the world for the younger; and therefore Henry would be intitled to the crown, either as ſucceſſor to Richard II. in caſe the intire male line was allowed a preference to the female; or, even prior to that unfortunate prince, if the crown could deſcend through a female, while an entire male line was exiſting.

However, as in Edward the third's time we find the parliament approving and affirming the law of the crown, as before ſtated, ſo in the reign of Henry IV. they actually exerted their right of new ſettling the ſucceſſion to the crown. And this was done by the ſtatute 7 Hen. IV. c. 2. whereby it is enacted "that the "inheritance of the crown and realms of England and France, "and all other the king's dominions, ſhall be ſet and remain (*b*) "in the perſon of our ſovereign lord the king, and in the heirs "of his body iſſuing;" and prince Henry is declared heir apparent to the crown, to hold to him and the heirs of his body iſſuing, with remainder to lord Thomas, lord John, and lord Humphry,

(*a*) Seld. tit. hon. 1, 3. (*b*) Soit mys et demoerge.

the king's ſons, and the heirs of their bodies reſpectively. Which is indeed nothing more than the law would have done before, provided Henry the fourth had been a rightful king. It however ſerves to ſhew that it was then generally underſtood, that the king and parliament had a right to new-model and regulate the ſucceſſion to the crown. And we may obſerve, with what caution and delicacy the parliament then avoided declaring any ſentiment of Henry's original title. However, ſir Edward Coke more than once expreſsly declares, (*c*) that at the time of paſſing this act, the right of the crown was in the deſcent from Philippa, daughter and heir of Lionel duke of Clarence. Blac. Com. 1 v. 202.

NOTE [B] p. 80.

Though the inveterate prepoſſeſſions of Edward kept him from ſeconding the pretenſions of Harold, yet he took but feeble and irreſolute ſteps for ſecuring the ſucceſſion to the duke of Normandy. The whole ſtory of the tranſactions between Edward, Harold, and the duke of Normandy is told ſo differently by the antient writers, that there are few important paſſages of the Engliſh hiſtory liable to ſo great uncertainty. It does not ſeem likely, as ſome have ſuppoſed, that Edward ever executed a will in the duke's favour, much leſs that he got it ratified by the ſtates of the kingdom, as is affirmed by others. The will would have been known to all, and would have been produced by the conqueror, to whom it gave ſo plauſible a title; but the doubtful and ambiguous manner in which he ſeems always to have mentioned it, proves, that he could only plead the known intentions of that monarch in his favour, which he was deſirous to call a will. There is indeed a charter of the conqueror, preſerved by Dr. Hickes, vol. 1. where he calls himſelf *rex hereditarius*, meaning heir by will; but a prince poſſeſſed of ſo much power, and attended with ſo much ſucceſs, may employ what pretences he pleaſes: it is ſufficient to refute his pretences to obſerve, that there is a great diffidence and variation among the hiſtorians with regard to a point, which, had it been real, muſt have been agreed upon by all of them.

As to the circumſtance of Harold's contract with the duke, in Normandy, ſome hiſtorians, particularly Malmeſbury and Matthew Weſtminſter, affirm that Harold had no intention of going over to Normandy, but that taking the air in a pleaſure boat on the coaſt, he was driven over, by ſtreſs of weather, to the territories of Guy, count of Ponthieu: but beſides that this

(*c*) 4 Inſt. 37. 205.

ſtory

ſtory is not probable in itſelf, and is contradicted by moſt of the antient hiſtorians, it is refuted by a very curious and authentic monument lately diſcovered. It is a tapeſtry, preſerved in the ducal palace of Roüen, and ſuppoſed to have been wrought by orders of Matilda, wife to the emperor: at leaſt, it is of very great antiquity. Harold is there repreſented as taking his departure from king Edward in execution of ſome commiſſion, and mounting his veſſel with a great train. The deſign of redeeming his brother and nephew, who were hoſtages, is the moſt likely cauſe that can be aſſigned; and is accordingly mentioned by Eadmer, Hoveden, Brompton, and Simeon of Durham. For a farther account of this piece of tapeſtry, ſee hiſtoire de l'Academie de Literature, tom. IX. p. 535. Hume.

NOTE [C] p. 81.

Harold had ſo well prepared matters before the death of the king, that he immediately ſtepped into the vacant throne; and his acceſſion was attended with as little oppoſition as if he had ſucceeded by the moſt unqueſtionable title. The citizens of London were his zealous partizans: the biſhops and clergy had adopted his cauſe: and all the moſt powerful nobility, connected with him by alliance, or by friendſhip, willingly ſeeonded his pretenſions. The title of Edgar Atheling was ſcarce ever mentioned: much leſs, the claim of the duke of Normandy: and Harold, aſſembling the council, received the crown from their hands, without waiting for any regular meeting of the ſtates, or ſubmitting the queſtion to their free choice or determination. (*a*) If there were any male contents at this reſolution, they were obliged to conceal their ſentiments; and the new prince taking a general ſilence for conſent, and founding his title on the ſuppoſed ſuffrages of the people, which appeared unanimous, was, on the day immediately ſucceeding Edward's death, crowned and anointed king, by Aldred, archbiſhop of York. The whole nation ſeemed joyfully to ſwear allegiance to him.

The duke of Normandy, when he firſt received intelligence of Harold's acceſſion, was moved to the higheſt pitch of indignation; but that he might give the better colour to his pretenſions, he ſent over an embaſſy to England, upbraiding Harold with his breach of faith, and ſummoning him to reſign immediately poſſeſ-

(*a*) G. Pict. 196. Ypod. neuſt. 436 Order. vitalis, 492. M. Weſt. 221. W. Malm. 93. Ingulf 68. Brompton 957. Knyghton 2339. H. Hunting. 210. Many of the hiſtorians ſay, that Harold was regularly elected by the ſtates; ſome, that Edward left him his ſucceſſor by will.

ſion of the kingdom. Harold replied that the oath with which he was reproached, had been extorted by the well grounded fear of violence, and could never, for that reaſon, be regarded as obligatory. That he had no commiſſion, either from the late king, or from the ſtates of England, who alone could diſpoſe of the crown, to make any tender of the ſucceſſion to the duke of Normandy; and if he, a private perſon, had aſſumed ſo much authority, and had even voluntarily ſworn to ſupport the duke's pretenſions, the oath was unlawful and it was his duty to ſeize the firſt opportunity of breaking it: that he had obtained the crown by the unanimous ſuffrages of the people; and ſhould ſhew himſelf totally unworthy of their favour, did he not ſtrenuouſly maintain thoſe national liberties, with which they had entruſted him: and that the duke, if he made any attempt by force of arms, ſhould experience the power of an united nation, conducted by a prince, who, ſenſible of the obligations impoſed on him by his royal dignity, was determined, that the ſame moment ſhould put a period to his life and to his government. (b) Hume.

NOTE [D] p. 81.

The moſt important ally, whom William gained by his negotiations, was the pope, who had a mighty influence over the antient barons, no leſs devout in their religious principles than valorous in their military enterprizes. The Roman pontiff, after an inſenſible progreſs during ſeveral ages of darkneſs and ignorance, began now to lift his head openly above all the princes of Europe; to aſſume the office of a mediator, or even an arbiter, in the quarrels of the greateſt monarchs; to interpoſe himſelf in all ſecular affairs, and to obtrude his dictates as ſovereign laws on his obſequious diſciples. It was a ſufficient motive to Alexander II. the reigning pope, for embracing William's quarrel, that he alone had made an appeal to his tribunal, and rendered him umpire of the diſpute between him and Harold; but there were other advantages, which, that pontiff foreſaw, muſt reſult from the conqueſt of England by the Norman arms. That kingdom, though at firſt converted by Romiſh miſſionaries, though it had afterwards advanced ſome farther ſteps towards ſubjection under Rome, maintained ſtill a great independance in its eccleſiaſtical adminiſtration; and forming a world within itſelf, entirely ſeparated from the reſt of Europe, it had hitherto proved inacceſſible to thoſe exorbitant claims, which ſupported the

(b) W. Malm. 99. Higden 285. M. Weſt. 222. De geſt. Angl. incerto auctore 331.

grandeur

grandeur of the papacy. Alexander, therefore, hoped, that the French and Norman barons, if ſucceſsful in their enterprize, might import into that country a more devoted reverence to the holy ſee, and bring the Engliſh churches to a nearer conformity with thoſe of the reſt of Europe. He declared immediately in favour of William's claim; (*a*) pronounced Harold a perjured uſurper; denounced excommunication againſt him and his adherents; and the more to encourage the duke of Normandy in his enterprize, he ſent him a conſecrated banner, and a ring with one of St. Peter's hairs in it. (*b*) Thus were all the ambition and violence of that invaſion covered over ſafely with the broad mantle of religion.

NOTE [E] p. 83.

Some writers have been deſirous of refuſing to this prince the title of conqueror, in the ſenſe in which it is commonly underſtood; and on pretence, that the word is ſometimes in old books applied to ſuch as make an acquiſition of territory by any means, they are willing to reject William's title, by right of war, to the crown of England. It is needleſs to enter into a controverſy, which, by the terms of it, muſt neceſſarily degenerate into a diſpute of words. It ſuffices to ſay, that the duke of Normandy's firſt invaſion of the iſland was hoſtile; that his ſubſequent adminiſtration was entirely ſupported by arms; that in the very frame of his laws, he made a diſtinction between the Normans and Engliſh, to the advantage of the former; (*a*) that he acted in every thing as abſolute maſter over the natives, whoſe intereſts and affections he totally diſregarded; and that if there was an interval when he aſſumed the appearance of a legal magiſtrate, the period was very ſhort, and was nothing but a temporary ſacrifice, which he, as has been the caſe with moſt conquerors, was obliged to make of his inclination to his preſent policy. Scarce any of thoſe revolutions, which, both in hiſtory and in common language, have always been denominated conqueſts, appear equally violent, or have been attended with ſo ſudden an alteration both of power and property. The Roman ſtate, which ſpread its dominion over Europe, left the rights of individuals, in a great meaſure untouched; and thoſe civilized conquerors, while they made their own country the ſeat of empire, found, that they could draw moſt advantage from the ſubject provinces, by beſtowing on the natives the free enjoyment of their own laws, and of their private poſſeſſions. The barbarians, who ſubdued

(*a*) W. Malm. 100. Ingulf, 69. Higden, 285. Brompton, 958.
(*b*) Baker, 22. edit. 1684.
(*a*) Hoveden, p. 600.

the Roman empire, though they ſettled in the conquered countries, yet being accuſtomed to a rude uncultivated life, found a ſmall part of the land ſufficient to ſupply all their wants; and they were not tempted to ſeize extenſive poſſeſſions, which they neither knew how to cultivate nor employ. But the Normans and other foreigners, who followed the ſtandard of William, while they made the vanquiſhed kingdom the ſeat of empire, were yet ſo far advanced in arts as to be acquainted with the advantages of a large property; and having totally ſubdued the natives, they puſhed the rights of conqueſt (very extenſive in the eyes of avarice and ambition, however narrow in thoſe of reaſon) to the utmoſt extremity againſt them. Except the former conqueſt of England by the Saxons themſelves, who were induced by peculiar circumſtances, to proceed even to the extermination of the natives, it would be difficult to find in all hiſtory a revolution more deſtructive, or attended with a more complete ſubjection of the antient inhabitants. Contumely ſeems even to have been wantonly added to oppreſſion; (*b*) and the natives were univerſally reduced to ſuch a ſtate of meanneſs and poverty, that the Engliſh name became a term of reproach; and ſeveral generations elapſed before one family of Saxon pedigree was raiſed to any conſiderable honors, or could ſo much as attain the rank of barons of the realm. (*c*) Theſe facts are ſo apparent from the whole tenor of the Engliſh hiſtory, that none would have been tempted to deny or elude them, were they not heated by the controverſies of faction; while one party were abſurdly afraid of theſe abſurd conſequences, which they ſaw the other party inclined to draw from this event. But it is evident, that the preſent rights and privileges of the people, who are a mixture of Engliſh and Normans, can never be affected by a tranſaction, which paſſed ſeven hundred years ago; and as all antient authors, (*d*) who lived neareſt the time, and beſt knew the ſtate of the

(*b*) H. Hunt, p. 370. Bromptom, p. 980.

(*c*) So late as the reign of king Stephen, the earl of Albemarle, before the battle of the ſtandard, addreſſed the officers of the army in theſe terms: *Proceres Angliæ clariſſimi, et genere Normanni*, &c. Brompton, p. 1026. See farther Abbas Rieval. p. 339, &c. All the barons and military men of England ſtill called themſelves Normans.

(*d*) Ingulf, p. 70. H. Hunt, p. 370, 372. M. Weſt. p. 225. Gul. Neub. p. 357. Alured. Beverl. p. 124. De geſt. Angl. p. 333. M. Paris, p. 4. Sim. Dun. p. 206. Brompton, p. 962, 980, 1161. Gervaſe Tilb. lib. 1. cap. 16. Textus Roſſenſis apud Seld. Spicileg. ad Eadm. p. 197. Gul. Pict. p. 206. Ordericus vitalis, p. 521, 666, 853. Epiſt. St. Thom. p. 801. Gul. Malmes. p. 52, 57. Knyghton, p. 2354. Eadmer,

the country, unanimouſly ſpeak of the Norman dominion as a conqueſt by war and arms, no reaſonable man, from the fear of imaginary conſequences, will ever be tempted to reject their concurring and undoubted teſtimony. Hume.

NOTE [F] p. 85.

Though the early confiſcation of Harold's followers might ſeem iniquitous; being extended towards men who had never ſworn fidelity to the duke of Normandy, who were ignorant of his pretenſions, and who only fought in defence of the government, which they themſelves had eſtabliſhed in their own country: yet were theſe rigors, however contrary to the antient Saxon laws, excuſed on account of the urgent neceſſities of the prince. The ſucceſſive deſtruction of families was a convincing proof that the king intended to rely entirely on the ſupport and affections of foreigners; and new forfeitures, attainders, and violences were the neceſſary reſult of this deſtructive plan of adminiſtration. No Engliſhman poſſeſſed his confidence, or was intruſted with any command or authority; and ſtrangers, whom a rigorous diſcipline could have but ill contained, were encouraged in every act of inſolence and tyranny againſt them. The eaſy ſubmiſſion of the kingdom on its firſt invaſion, had expoſed the natives to contempt; the ſubſequent proofs of their animoſity and reſentment had made them the object of hatred; and they were ſoon deprived of every expedient, by which they could hope to make themſelves either regarded or beloved by their ſovereign. Impreſſed with the ſenſe of this diſmal ſituation, many Engliſhmen fled into foreign countries, with an intention of paſſing their lives abroad free from oppreſſion, or of returning on a favourable opportunity to aſſiſt their friends in the recovery of their native

Eadmer, p. 110. Thom. Rudborne in Ang. ſacra, vol. I. p. 248. Monarch. Roff. in Anglia ſacra, vol. II. p. 276. Girald. Cambr. in eadem, vol. II. p. 413. Hiſt. Elyenſis, p. 516. The words of this laſt hiſtorian, who is very antient, are remarkable, and worth tranſcribing. Rex itaque factus Willielmus, quid in principes Anglorum, qui tantæ cladi ſupereſſe poterant, fecerit, dicere, cum nihil profit, omitto. Quid enim prodeſſet, ſi nec unum in toto regno de illis dicerem priſtina poteſtate uti permiſſum, ſed omnes aut in graven paupertatis ærumnam detruſos, aut ex hæreditatos, patria pulſos, aut effoſis oculis, vel cæteris amputatis membris, opprobrium hominum factos, aut certe miſerrime afflictos, vita privatos. Simili modo utilitate carere exiſtimo dicere quid in minorem populum, non ſolum ab eo, ſed a ſuis actum ſit, cum id dictu ſciamus difficile, et ob immanem crudelitatem fortaſſis incredibile.

liberties.

liberties. (*a*) It was crime ſufficient in an Engliſhman to be opulent, or noble, or powerful; and the policy of the king, concurring with the rapacity of his foreign adventurers, produced almoſt a total revolution in the landed property of the kingdom. Antient and honourable families were reduced to beggary; the nobles themſelves were every where treated with ignominy and contempt; they had the mortification of ſeeing their caſtles and manors poſſeſſed by Normans of the meaneſt birth, and of the loweſt ſtations, (*b*) and they found themſelves carefully excluded from every road, which led either to riches or preferment. (*c*) Hume.

NOTE [G] p. 86.

All thoſe lands which were in the poſſeſſion of Edward the confeſſor, and which afterwards came to William the conqueror, and were by him ſet down in a book called DOMESDAY, under the title *de terra regis*, are ANCIENT DEMESNE LANDS: theſe were exempt from any *feudal* ſervitude, and were let out to huſbandmen to cultivate for the purpoſe of ſupplying the king's houſhold and family, with proviſions and neceſſaries; and for this purpoſe the tenants (who are called by Bracton, *villani privilegiati*) enjoyed certain privileges, and the tenure itſelf had ſeveral properties diſtinct from others, which it retains to this day; though the lands be in the hands of a ſubject, and the ſervices changed from labour to money. 2 Inſt. 542. 4 Inſt. 269. F. N. B. 14. Salk. 57. pl. 2. Black. Com. 2 v. 99. But the lands which were in the poſſeſſion of Edward the confeſſor, and which were given away by him, are NOT at this day ancient demeſne; nor are any others, except thoſe writ down in the book of DOMESDAY; and therefore, whether ſuch lands are antient demeſne, or not, is to be tried only by that book. Salk. 57. 4 Inſt. 269. Hob. 188. Brownl. 43. [N. B. The book of DOMESDAY was brought into court by a certiorari out of chancery, directed to the treaſurer and chamberlain of the exchequer, and by mittimus ſent into the common pleas. Dy. 150. b.

(*a*) Order. Vital. 508. M. Weſt. 225. M. Paris, 4. Sim. Dun. 197.

(*b*) Order. Vitalis, 521. M. Weſt. 229.

(*c*) The obliging all the inhabitants to put out their fires and lights at certain hours, upon the ſounding of a bell, called the courfeu, is repreſented by Polydore Virgil, lib. 9, as a mark of the ſervitude of the Engliſh. But this was a law of police, which William had previouſly eſtabliſhed in Normandy. See du Moulin, hiſt. de Normandie, 160. The ſame law had place in Scotland. Le. Burgor, cap. 86.

Iſſue

Iſſue was taken "whether Longhope in the county of Glouceſ-"ter was ancient demeſne or not;" on producing the book of DOMESDAY, it appeared that Hope was ancient demeſne, but nothing ſaid of Longhope; and the court held, that the party failed in his proof. Lev. 106. Sid. 147.] But if the queſtion is, "whether lands be parcel of a manor, which is ancient de-"meſne?" this ſhall be tried by a jury. Salk. 56. pl. 1, 2 Salk. 174. But ſee Burr. 1048. Where an acre of land may be ancient demeſne, though the manor, of which it is parcel, is not ſo, Vide Rol. Abr. 321. and ſee F. N. B. 14. Leon. 232. Dyer 8. 11 Co. 10. Bro. Ancient Dem. 15. 2 Leon. 191. 3 Lev. 405. Lands which are next, or moſt convenient to the lord's manſion houſe, and which he keeps in his own hands, for the ſupport of his family, and for hoſpitality, are called his demeſnes, but have not the ſame properties with ancient demeſne. Spelm. 12. Mr. juſtice Blackſtone, in treating of the rents and profits of the demeſne lands of the crown, as being a branch of the king's ordinary revenue, ſays, "theſe demeſne lands, *terrae dominicales regis*, being either the ſhare reſerved to the crown at the original diſtribution of landed property, or ſuch as came to it afterwards by forfeitures or other means, were antiently very large and extenſive; comprizing divers manors, honors and lord-ſhips; the tenants of which had very peculiar privileges. At preſent they are contracted within a very narrow compaſs, having been almoſt entirely granted away to private ſubjects. This has occaſioned the parliament frequently to interpoſe; and, particularly, after king William III. had greatly impoveriſhed the crown, an act paſſed, (1 Ann ſt. 1. c. 7.) whereby all future grants or leaſes from the crown, for any longer term than thirty-one years, or three lives, are declared to be void; except with regard to houſes, which may be granted for fifty years. And no reverſionary leaſe can be made, ſo as to exceed, together with the eſtate in being, the ſame term of three lives or thirty-one years: that is, where there is a ſubſiſting leaſe, of which there are twenty years ſtill to come, the king cannot grant a future intereſt, to commence after the expiration of the former, for any longer term than eleven years. The tenant muſt alſo be made liable to be puniſhed for committing waſte; and the uſual rent muſt be reſerved, or, where there has uſually been no rent, one third of the clear yearly value. The misfortune is, that this act was made too late, after almoſt every valuable poſſeſſion of the crown had been granted away for ever, or elſe upon very long leaſes; but may be of benefit to poſterity, when thoſe leaſes come to expire. Black. Com. 1 v. 286. As to the tenure, lord Holt, ſaid it was as ancient as any other, though he ſuppoſes that the privileges annexed to it, commenced by ſome act of parliament;

for

for that it cannot be created by grant at this day. Salk. 57. Mr. juſtice Blackſtone, in treating of this tenure, deſcribes it thus: "There is a ſpecies of tenure, deſcribed by Bracton under the "name ſometimes of privileged villenage, and ſometimes of "villein ſocage." This, he tells us, l. 4. tr. 1. c. 28, is ſuch as has been held of the kings of England from the conqueſt downwards; that the tenants herein *villana faciunt ſervitia, ſed certa et determinata*; that they cannot aliene or transfer their tenements by grant or feoffment, any more than pure villeins can; but muſt ſurrender them to the lord or his ſteward, to be again granted out and held in villenage. And from theſe circumſtances we may collect, that what he here deſcribes is no other than an exalted ſpecies of copyhold, ſubſiſting at this day, viz. The tenure in antient demeſne; to which as partaking of the baſeneſs of villenage in the nature of its ſervices, and the freedom of ſocage in their certainty, he has therefore given a name compounded out of both, and calls it VILLANUM SOCAGIUM. The tenants of ancient demeſne lands, under the crown, were not all of the ſame order or degree. Some of them, as Britton teſtifies, c. 66. continued for a long time pure and abſolute villeins, dependent on the will of the lord; and thoſe who have ſucceeded them in their tenures now differ from common copyholders in only a few points. F. N. B. 228, others were in great meaſure enfranchiſed by the royal favor, being only bound in reſpect of their lands to perform ſome of the better ſort of villein ſervices, but thoſe DETERMINATE and CERTAIN; as, to plough the king's land, to ſupply his court with proviſions, and the like; all of which are now changed into pecuniary rents: and in conſideration hereof they had many immunities and privileges granted to them; 4 Inſt. 269. as, to try the right of their property in a peculiar court of their own, called a court of ancient demeſne, by a peculiar proceſs denominated, a writ of right cloſe: F. N. B. 11. not to pay toll or taxes; not to contribute to the expences of knights of the ſhire; not to be put on juries, and the like. See 1 New Abr. 111. Theſe tenants therefore, though their tenure be abſolutely copyhold, yet have an intereſt equivalent to a freehold: for, though their ſervices were of a baſe and villeno uſo original, (Gilb. hiſt. exch. 16, 30.) yet the tenants were eſteemed in all other reſpects to be highly privileged villeins; and eſpecially in this, THAT THEIR SERVICES WERE FIXED AND DETERMINATE, and that could not be compelled (like pure villeins) to relinquiſh theſe tenements at the lord's will, or to hold them againſt their own: "*et ideo*, ſays Bracton, *dicuntur* "*liberi*." "Britton alſo, from ſuch their freedom, calls them "abſolutely SOKEMANS, and their tenure SOKEMANRIES; which "he deſcribes (c. 66.) to be lands and tenements, which are not

"held by knight ſervice, nor by grand ſerjeanty, nor by petit, "but by ſimple ſervices, being as it were lands enfranchiſed by "the king or his predeceſſors from their ancient demeſne." And the ſame name is alſo given them in Fleta, l. 1. c. 8. Hence Fitzherbert obſerves, N. B. 13. that no lands are ancient demeſne, but lands holden in ſocage: that is, not in free and common ſocage, but in this amphibious, ſubordinate claſs, of villein ſocage. And it is poſſible, that as this ſpecies of ſocage tenure is plainly founded upon *predial* ſervices, or ſervices of the plough, it may have given cauſe to imagine that all ſocage tenures aroſe from the ſame original; for want of diſtinguiſhing, with Bracton, between free ſocage or ſocage of frank tenure, and villein ſocage or ſocage of ancient demeſne.—Lands holden by this tenure are therefore a ſpecies of copyhold, and as ſuch preſerved and exempted from the operation of the ſtatute of 12 Cha. 2. c. 24. Yet they differ from common copyholds, principally in the privileges before mentioned: as alſo they differ from freeholders by one eſpecial mark and tincture of villenage, noted by Bracton and remaining to this day, viz. that they cannot be conveyed from man to man by the general common law conveyances of feoffment, and the reſt; but muſt paſs by ſurrender to the lord or his ſteward, in the manner of common copyholds: yet with this difference, (Kitch. on courts 194,) that, in the ſurrenders of theſe lands in antient demeſne, it is not uſed to ſay, "to hold at the will of the lord," in their copies, but only "to hold according to the CUSTOM *of the manor*." Black. Com. 2 v. 101. How ancient demeſne may become frank-fee; and where it may be pleaded, and the form thereof, vide 1 New Abr. 112, 113, and the authorities there cited.

NOTE [H] p. 95.

Notwithſtanding the authority of ſir Matthew Hale, which tends to ſupport the opinion, that feuds were introduced into this kingdom by the conqueror, yet there are others of no ſmall conſequence, who ſeem to hold a very contrary doctrine. Among theſe we may rank, ſir Edward Coke, the judges of Ireland, Mr. Selden, Nathaniel Bacon, ſir William Temple, Saltern, and the author of the Mirror.—In truth the authorities on each ſide are numerous and reſpectable, and that the ſtudent may exerciſe his own judgment on this ſeemingly important queſtion, I have taken the liberty to ſubjoin the different opinions, which have been publiſhed on the ſubject. Sir Edward Coke ſays that, "the "tenure by knights ſervice is of great antiquity, for ſo it was "in the time of king Alfred." 1 Inſt. 76. b. See Id. 64. a. 83.

83. a. But this opinion of Sir Edward Coke's, Mr. Hargave, the late and able editor of Coke on Littleton, ſeems, in ſome degree to controvert; vide Harg. note 1. on Co. Lit. 64. a. and note 1. on id. 83. a.

Coke alſo, in the preface to his third report, ſuppoſes, that the redditiones ſocharum et regis ſervitium, ſaid in the book of Domeſday, a conſtitutione antiquorum temporum, to belong to the church of Worceſter, within the hundred of Aſwaldſhaw, prove ſocage tenure, and knight ſervice, long before the conqueſt.

The judges of Ireland, in the caſe of tenures, ſuppoſed, that the Thani majores, or Thani regis among the Saxons, were the king's immediate tenants of lands, which they held by perſonal ſervice, as of the king's perſon by grand-ſerjeanty, or knight ſervice in capita; and that the land ſo held, was in thoſe times called Thaneland, as land holden in ſocage was called Reveland. And that after ſome years that followed the coming of the Normans, the title of Thane grew out of uſe, and that of baron and barony ſucceeded for Thane, and Thaneland. They therefore concluding ſir Henry Spelman miſtaken, who in his gloſſary, verbo feudum, refers the original of feuds in England, to the Norman conqueſt, laid it down, as moſt manifeſt, that capite tenures, tenures by knight ſervice; tenures in ſocage, &c. were frequent in the times of the Saxons, but that indeed the poſſeſſions of biſhops and abbots, were firſt made ſubject to knight ſervice in capite by William the conqueror, in the fourth year of his reign, &c. See the caſe of tenures upon the commiſſion of defective titles, &c. 8vo. printed at London, 1720. or the ſubſtance of the caſe as to this point, in biſhop Gibſon's preface to Spelman's treatiſe of feuds, &c.

Mr. Selden, in treating of the dignity of an earl, ſays that in ſome places in England it was both feudal and inheritable, even from the firſt coming of the Saxons into England, which is commonly placed in 448, of our Saviour, though by exacter calculation it falls twenty years ſooner; and that Ethelred, Ealdorman of Merceland, had all that which was the kingdom of Mercland to his own uſe, as an earldom and fief given him in marriage with Ethelfled, by her father king Alfred; and to prove this, cites William of Malmeſbury de geſt. regum. Lib. 2. cap. 4. Londonium caput regni Merciorum cuidam Primario Ethelredo in fidelitatem ſuam cum filia Ethelfledâ conceſſit. Vide Seld. tit. of hon. 510, 511. He ſays indeed, ibid. that Aſſerius and Florentius have it ſervandum commendavit: and if he had gone on, he would have found that William of Malmeſbury, himſelf, in the very next line, calls it COMMISSUM, and afterwards cap. 5. commendatum; which words rather ſuggeſt a truſt

truſt than a feud. Vide Malmes. de geſt. regum inter ſcriptores poſt Bedam, fol. 44, 46. and Spelm. Poſthum. treat. of feuds, 13.

Mr. Selden likewiſe ſuppoſes the names of Thane and Vavaſor in the Saxon times, to have been feudal; and that as earl, king's thane, and middle thane, ſucceeded one the other in the Saxon laws, ſo count, baron, and vavaſor, are uſed as interpreters of them in the French laws of William I. and that the king's thanes held of the king in chief by knight ſervice, and were of the ſame kind with them, that were after the Normans, honorary or parliamentary barons. Tit. of hon. 513. and he ſays ibid. 520. that a vavaſor was in the moſt antient times only a tenant by knight ſervice: that either held of a meſne lord, and not immediately of the king, or at leaſt of the king, as of an honour or manor, and not in chief.

Nathaniel Bacon thinks that it is not clear from any author of credit, that the Normans changed the tenures of lands. And that none of them appeared to him to be of Norman original, although they received their names according to that dialect. Bacon hiſt. of the Eng. gov. 161.

Sir William Temple obſerves, that thoſe authors who will make the conqueror to have broken or changed the laws of England, and introduced thoſe of Normandy, pretend that the duty of eſcuage, with the tenures of knight ſervice and baronage, came over in this reign; but that it needs no proof, that thoſe, with the other feudal laws, were all brought into Europe by the antient Goths, and by them ſettled in all the provinces which they conquered of the Roman empire; and among the reſt by the Saxons in England, as well as by the Franks in Gaul, and the Normans in Normandy. Temp. Introd. to the hiſtory of Eng. 171, 172.

Saltern ſuppoſes conveyances by feoffment and livery to have been before the conqueſt, and that there were lords and tenants in the days of Gorbonian the good, and that fealty was ſworn to the prince in the time of Elidurus; which of neceſſity (ſays he) were accompanied with tenures, ſervices, diſtreſſes, and the like. Vide Saltern, de antiquis Britan. legibus, cap. 8.

And laſtly, the author of the Mirror ſeems to imagine, that tenures were ordained for the defence of the realm, by our old kings, before the conqueſt. Vide Mir. cap. 1. ſect. 3. p. 11, 12.

In oppoſition to theſe reſpectable authorities and in ſupport of ſir Matthew Hale's opinion, may be adduced the ſentiments of Crag, of Spelman, of Somner, Matthew Paris, Camden, Dr. Hody and ſir Martin Wright. The firſt of theſe, in his treatiſe de jur. feud. 29. ſays "Anglos ante conqueſtum vix puto hoc

" jus (ſcilicet feudorum) recepiſſe, rationes cur ita credam hæ " ſunt—Scio ante conqueſtum multas apud Anglos leges ab " Anglo Saxonum regibus ante conqueſtum conſcriptas—Ne " veſtigium quidem juris feudalis in eis pæne reperitur, nam " licet vaſallorum in dominos ingratitudo, ſive felonia expreſſe " aliquo ſtatuto puniatur, pœna tamen non eſt amiſſio feudi, ut " in jure feudali, ſed tantum vel mulcta pecuniaria, ſi parve ſit " injuria, vel pœna capitis, ſi major, quæ juris feudalis naturam " non ſapiunt.—Præterea ex ipſo Polydoro, qui Anglorum hiſ- " toriam conſcripſit diligentiſſime, conſtat manifeſte, conqueſ- " torem, cum omnia Angliæ prædia jure belli ad ſe pertinere " diceret, legem agrariam tuliſſe, quâ ſe omnium poſſeſſionum " dominum declaravit (quod nihil aliud erat quam omnia prædia " de eo tanquam domino teneri,) &c."

Sir H. Spelman ſays, " jus feodale Anglis primus impoſuit " Gulielmus conqueſtor," (Gloſs. ad Mag. Chart. fol. 374) and again, (ad verbum feodum) " Feodorum ſervitutes in Bri- " tanniam noſtram primus invexit Gulielmus ſenior conqueſtor " nuncupatus, qui lege ea e Normanniâ introducta Angliam " totam ſuis diviſit commilitibus: innuit hoc ipſum codex ejus " agrarius—(Qui) Feudum et Normanniam jungit, ac ſi rei " novæ notitia e Normannia diſquirenda aſſet." And it being ſaid by the judges of Ireland, in the abovementioned caſe of tenures, that ſir H. Spelman, thus referring the original of feuds in England, to the Norman conqueſt, was miſtaken; he wrote an elaborate treatiſe of the nature and original of feuds and tenures in ſupport of his opinion. This treatiſe was publiſhed by biſhop Gibſon 1723, among the poſthumous works of this great man.

Mr. Somner ſays, that " before the conqueſt, we were not " in this kingdom acquainted with what ſince, and to this day, " we call Feoda, foreigners Feuda, i. e. Fiefs or Fees, either " in that general ſenſe I mean, wherein they are diſcourſed of, " and handled abroad in the book, thence intitled, de feudis, " at home in that called Littleton's tenures. Treat. of Gav. 100, 104." and concludes, that " to the conqueror it is, that the " names and cuſtoms of our Engliſh fees, or (as we now vul- " garly call them) tenures, ſuch at leaſt as are military, owe " their introduction."

Matthew Paris, Anno 1068. fol. 6. ſays, that " William I. " commilitionibus ſuis, qui bello Haſtingenſi regionem ſecum " ſubjugaverant, terras Anglorum et poſſeſſiones affluentiori " manu contulit, illudque parum quod romanſerat ſub jugo po- " ſuit perpetuæ ſervitutis." And again, anno 1070. fol. 7. he ſays, that this king " Epiſcopatus quoq; et abbatias omnes " quæ baronias tenebant, et eatenus ab omni ſervitute ſeculari

" libertatem

" libertatem habuerant, ſub ſervitute ſtatuit militari, irrotulans " ſingulos epiſcopatus et abbatias pro voluntate ſua quot milites " ſibi et ſucceſſoribus ſuis hoſtilitatis tempore voluit a ſingulis " exhiberi: et rotulos hujus eccleſiaſticæ ſervitutis ponens in " theſauris, multos viros eccleſiaſticos huic conſtitutioni peſſimæ " reluctantes a regno fugavit."

Mr. Camden aſſerts, that " the Engliſh were diſpoſſeſſed of " their hereditary eſtates by William I. and the lands and farms " divided among his ſoldiers, but with this reſerve that he ſhould " ſtill remain the direct proprietor, and oblige them to do ho- " mage to him and his ſucceſſors; that is (ſays he) that they " ſhould hold them in fee, but the king alone chief lord, and " they feudatory lords, and in actual poſſeſſion.

Dr. Hody ſays, that " baronies, and ſuch tenures, were firſt " brought into England by the conqueror." Hiſt of Convoc. 117. and Bracton, ſpeaking of the regale ſervitium, intimates as much in theſe words, " ſecundum quod in conqueſtu fuit " adinventum." Bract. lib. 2. cap. 16. ſect. 7.

Sir Martin Wright, in his introduction to the law of tenures, 52, obſerves, that William I. about the twentieth year of his reign (*a*) and not till then, ſummoned all the great men and landholders in the kingdom, (*b*) to do their homage, and ſwear their fealty to him: from whence he infers, that this was done in conſequence of ſomething new, or that theſe feudal engagements would have been required long before; and if ſo, that it is probable feudal tenures were then new. See alſo Dugd. Orig. Jurid. 6. Wilkin's Leg. Anglos Saxon, fo. 288, 289. Cottoni Poſthuma, 13, 14, 346. Mr. Hume is of opinion that they were introduced by the conqueror; Vide hiſt. Eng. 1 v. oct. 270. So is Mr. juſtice Blackſtone, vide Blac. Com. 4 v. 418, but ſee the fourth chapter of the ſecond book of his commentaries, paſſim. See alſo Barrington's obſervations on the ſtatutes 108, who ſeems to entertain the ſame opinion. Dr. Sullivan alſo contends for the ſame doctrine; vide his lectures 14, 15, ſeq. and 270. ſeq.

On the whole it ſhould ſeem, that William introduced into England the feudal law, which he found eſtabliſhed in France and Normandy, and which, during that age, was the foundation both of the ſtability and of the diſorders in moſt of the monarchical governments of Europe.

(*a*) Seld. Præf. ad Eadmer, fol. 5. Mad. hiſt. of the Exche. fol. 6. in Marg.

(*b*) Hen. of Huntingd. inter ſcript. poſt Bedam, 908. Hoveden 460. and the Waverly annals ad an. 1084, 1086.

NOTE

NOTE [I] p. 96.

The book called Doomſday, proves the great and extenſive genius, and does honor to the memory of William: it was begun in the year 1081, and was a general ſurvey of all the lands in the kingdom; their extent in each diſtrict, their proprietors, tenures, value; the quantity of meadow, paſture, wood, and arable land, which they contained; and in ſome counties the number of tenants, cottagers, and ſlaves of all denominations, who lived upon them. He appointed commiſſioners for this purpoſe, who entered every particular in their regiſter by the verdict of juries; and after a labour of SIX YEARS (for the work was ſo long in finiſhing) brought him an exact account of all the landed property of his kingdom. Chron. Sax. 190. Ingulf. 79. Chron. T. Tykes, 23. H. Hunt. 370. Hoveden, 460. M. Weſt. 229. Flor. Wigorn. 641. Chron. Abb. St. Petri de Bungo, 51. M. Paris, 8. The three northern counties, Weſtmorland, Cumberland, and Northumberland, were not comprehended in this ſurvey; Mr. Hume ſuppoſes, becauſe of their wild uncultivated ſituation. This monument called DOMESDAY BOOK, the moſt valuable piece of antiquity poſſeſſed by any nation, is ſtill preſerved in the exchequer; and tho' only ſome extracts of it have hitherto been publiſhed, yet it ſerves to illuſtrate to us in many particulars. the ancient ſtate of England. The great Alfred had finiſhed a like ſurvey of the kingdom in his time, which was long kept at Wincheſter, and which probably ſerved as a model to William in this undertaking. Ingulf. 8. Hume.

Mr. Madox in his hiſtory of the exchequer v. 1. p. 296. ſays, "the great and memorable ſurvey of the lands holden in DEMEANE, "within this realm which was finiſhed in the year 1086, and is "called DOMESDAY-BOOK, ſheweth under the title, TERRA "REGIS, what and which the demeanes of the crown were, at that time, and in the time of king Edward the confeſſor: and hath been ever ſince counted the great index, to diſtinguiſh the king's demeanes, from his eſcheats and other lands, and from the lands of other men." It is generally known, that the queſtion "whether lands are ancient demeſne, or not?" is to be decided by the DOMESDAY of William I. from whence there is no appeal; and it is a book of that authority, that even the conqueror himſelf ſubmitted ſome caſes, wherein he was concerned to be determined by it. See before note (F.) on this chap.

It may be neceſſary to notice, ſome conjectures, reſpecting the etymon of the word DOMESDAY. Many have ſuppoſed it to allude

allude to the final day of judgment. Hammond apprehends, that the addition of DAY to this DOME-BOOK was not meant with any alluſion to the final day of judgment; but was to ſtrengthen and confirm it, and ſignifieth the JUDICIAL DECISIVE RECORD, or, BOOK OF DOOMING JUDGMENT AND JUSTICE. Ham. Annot. But the ingenious obſerver on our antient ſtatutes, goes much farther; "the common etymology of the word DOOMESDAY, "(ſays Mr. Barrington) in which all the gloſſaries agree, viz. "the compariſon of it to the day of judgment, never appeared "to me ſatisfactory:" if this whimſical account of the name was the real one, the latin for it would be DIES JUDICII; whereas, in all the old chronicles, it is ſtiled either LIBER JUDICIALIS or CENSUALIS. Bullet in his celtic dictionary, hath the word DOM, which he renders, ſeur, ſeigneur, and hence the Spaniſh word DON; as alſo the words DEYA and DEIA, which he tranſlates PROCLAMATION, ADVERTISEMENT. Doomſday therefore may ſignify the lord's or king's advertiſement to the tenants who hold under him, and this ſenſe of the word agrees well with part of the contents of this famous ſurvey. See likewiſe Upton's notes on b. 1. canto vii. ſt. 26. of Spenſer's Faerie Queen, where he produces inſtances of the word DAYE ſignifying judgment; and DAYES-MAN, an arbitrator or judge." [In the north of England, an arbitrator, or elected judge, is uſually termed a dies-man, or days-man: and Dr. Hammond ſaith, that the word DAY in all idioms ſignifies judgment.] "In a petition to "the king in parliament, by the treaſurer and barons of the ex-"chequer, they certify with regard to the manor of Tring in "Hertfordſhire," "invenimus in libro veſtro, qui vocatur "domeſday, &c." 6 Edw. 1. A. D. 1278. amongſt the collection now publiſhing by the munificence of parliament. Barring. obſ. on ſtat. 270.

Camden calls this book Gulielmi librum cenſualem, the tax book of king William; and it was further called Magna Rolla Winton. The dean and chapter of York have a regiſter ſtiled domeſday; ſo hath the biſhop of Worceſter; and there is an ancient roll in Cheſter caſtle, called doomſday-roll. Blount.

That the reader may have a clearer conception of the manner of entering the lands in this book, the following are ſome inſtances:

Eaſeſſa terra regis dimid. hundred. de Witham. Witham tenuit Haraldus T. R. E. pro maner et pro 5 hidis: tunc 21 villan. modo 15: tunc 9 bordar. modo 10; tunc 6 ſervi, modo 9; tunc 23 ſochemanni, et modo ſimiliter; tunc inter totum valebat 10 lib. modo 20; ſed vicecomes inter ſuas conſuetudines et placita, de dimid. hundred. recepit inde 34, lib. et 4 lib. de geruſma. In

hoc manerio adjacebant T. R. E. 34 liberi homines, qui tunc reddebant 10 ſol. de conſuetudine et 11d. Ex illis tenet Ilbodius 2, de 45 acr. et val. 6 ſol. et redd. maner. ſuam conſuetudinem. Tedricus Pointel 8, de dimid. hid. et 22 acr. dimid. reddentes conſuetud. Ranulph Piperel 10, de 2 hid. et 45 acr. non reddentes conſuetudinem. Willielmus Groſſe 5, et unus tantum reddit conſuetudinem, et val. 3 lib. 13 ſ. Rad. Baignard 6 et unus reddit conſuetud. et val 20 ſ. Hamo depifer. 1, de dimid. hid. et val. 20 ſ. Goſcelinus Loremarius habet terram unius, et non reddit conſuet. &c. modo cuſtodit hoc manerium, Petrus vicecomes in manu regis.

Thus in Engliſh, "Eaſſeſſe," [title in the top of the leaf,] "the kings land;" and before the particular manor or town, the hundred in which it lies is noted, as here, "the half hundred "of Witham. Harold held Witham, in the time of king Edward, "for a manor, and for 5 hides. Then there were twenty-one "villains, now fifteen, [for they ſet down what was in Edward "the confeſſors time, as well as in the conqueror's;] then there "were nine bordars, now ten, then 6 ſervants or ſlaves, now 9; "then there were twenty there ſochemans, now the ſame number; "then the whole was valued at ten pounds, now twenty pounds. "But the viſcount, or ſheriff, received from the half hundred, "for his cuſtoms, and mulcts, or forfeitures, thirty-three pounds, "and four pounds for fine or income. In this manor, or belonging to this manor, or in the bounds of this manor, there were, "in the time of king Edward thirty-four freemen, which then "paid an accuſtomable rent of ten ſhillings and eleven pence. "Of theſe, Ilbods holds two, which had forty-five acres, and "they were worth to him ſix ſhillings, and paid their old rent to "the manor. Tedric Pointel holds eight, who had half a hide, "and twenty-two acres and a half, paying cuſtom or old rent. "Ranulph Piperel holds ten, who had two hides and forty-five "acres, which paid no cuſtom or old rent. William Groſſe "holds five, and only one of them paid cuſtom, and were worth "to him three pounds, thirteen ſhillings, (by the year is to be "underſtood in all theſe ſums). Ralph Baignard holds ſix, "and one paid cuſtom; they were worth twenty ſhillings. "Hamo, the ſewer or ſteward, holds one, who had half a hide, "and was worth to him twenty ſhillings. Goſcelin Loreman "hath the land of one, and pays no cuſtom. Peter the viſcount, "or ſheriff, keeps this manor in the kings hand."

Eſſeſſa, terra regis hund. de Beventre. Haveringas tenuit Haroldus T. R. E. pro 1 maner. et pro 10 hid. Tunc 41 villan. modo 40 ſemp. 41 bordar. et 6 ſervi, et 2 car. in dominio; tunc 41 car. hominum, modo 40; ſylv. d. porc. c. acr. prati mod. 1 molen. et 2 runc. et 10 animalia, et 160 porc. et 269. ov.

Huic

Huic maner, adjacebant 4 lib. homines, de 4 hidis, T. R. E. reddentes conſuetudinem, modo ten. 3 hid. Rob. fil. Corbutionis. Hugo de Montafori quartam hidam, et non reddidere conſuetudinem eſſe quo eas habuere, &c. Hoc maner. val. T. R. E. 36 l. modo 40; et Petrus vicecomes inde recepit 80 l. de cenſu, et 10 l. de gerſumma." Thus in Engliſh: "Eſſex, title as before, "the king's land, the hundred of Beventre. Harold held Ha- "veringe, in the time of Edward the confeſſor, for one manor "and ten hides. Then there were forty-one villains, now forty; "there were always forty-one bordars, and ſix ſervants or ſlaves, "and two carucates in demeſne, or the lords lands; there were "forty-one carucates among the men or tenants, now forty; "wood ſufficient for five hundred hogs, one hundred acres of "meadow, now one mill, and two working horſes, or pack- "horſes, and ten young growing beaſts, one hundred and ſixty "hogs, and two hundred and ſixty-nine ſheep. To this manor "there belonged four freemen, who had four hides in the time "of Edward the confeſſor, paying an accuſtomable rent. Now "Robert, ſon of Corbutio, holds three of thoſe hides, and "Hugh Montfort the fourth, and have paid no rent ſince they "held them. This manor was worth thirty-ſix pounds, now "forty; and Peter the viſcount, or ſheriff, receives from it "eighty pounds for rent, and ten pounds for an income or fine."

For farther particulars concerning doomſday-book, ſee Spelm. gloſſ. ad verbum domeſdei. Seld. pref. ad Eadm. 3, 4. Gerv. de Tilb. Dial. de ſcacc. l. 1. c. 16. Ingulf. hiſt. int. ſcript. poſt. Bedam, 908, 909. See alſo an account of doomſday-book, and an account of Danegeld, both printed by order of the Antiq. Soc. in 1756. and Groſſe's Antiq. of England and Wales.

CHAP. VI.

Concerning the parity or ſimilitude of the laws of England *and* Normandy, *and the reaſons thereof.*

THE great ſimilitude that in many things appears between the laws of England, and thoſe of Normandy, has given ſome occaſion to ſuch as conſider not well of things, to ſuppoſe that this happened by the power of the conqueror, in conforming the laws of this kingdom to thoſe of Normandy; and therefore will needs have it, that our Engliſh laws ſtill retain the mark of that conqueſt, and that we received our laws from him as from a conqueror; than which aſſertion, (as it appears even by what has before been ſaid) nothing can be more untrue. Beſides, if there were any laws derived from the Normans to us, as perhaps there might be ſome, yea, poſſibly many; yet it no more concludes the poſition to be true, that we received ſuch laws per modum conqueſtus, than if the kingdom of England ſhould at this day take ſome of the laws of Perſia, Spain, Egypt, or Aſſyria, and by authority of parliament ſettle them here. Which though they were for their matter foreign, yet their obligatory power, and their formal nature or reaſon of becoming laws here, were not at all due to thoſe countries, whoſe laws they were; but to the proper and intrinſical authority of this kingdom, by which they were received as, or enacted into, laws: and therefore, as no law that is foreign, binds here in England, till it be received and authoritatively engrafted into the law of England; ſo there is no reaſon in common prudence and underſtanding for any man to conclude, that no rule or method of juſtice is to be admitted in a kingdom, though never ſo uſeful or beneficial, barely upon this account,—that another people entertained it, and made it a part of their laws before us.

But as to the matter itſelf, I ſhall conſider, and enquire of the following particulars, viz.

1. How long the kingdom of England, and dutchy of Normandy, ſtood in CONJUNCTION, under ONE governor.

2. What

2. What evidence we have touching the laws of Normandy, and of their agreement with ours.

3. Wherein conſiſts that parity, or diſparity, of the Engliſh and Norman laws.

4. What might be reaſonably judged to be the reaſon and foundation of that likeneſs, which is to be found between the laws of both countries.

Firſt, touching the conjunction under one governor of England and Normandy, we are to know, that the kingdom of England and dutchy of Normandy were de facto in conjunction under theſe kings, viz. William I. William II. Henry I. king Stephen, Henry II. and Richard I. who, dying without iſſue, left behind him Arthur, earl of Britain, his nephew, only ſon of Geoffry earl of Britain, ſecond brother of Richard I.—and John the youngeſt brother to Richard I. who afterward became king of England by USURPING the crown from his nephew Arthur. But the princes of Normandy ſtill adhered to Arthur,—ſicut domino ligeo ſuo dicentes judicium & conſuetudinem eſſe illarum regionum ut Arthurus filius fratris ſenioris in patrimonio ſibi debito & hæreditate avunculo ſuo ſuccedat eodem jure quod Gaulfridas pater ejus eſſet habiturus ſi regi Richardo defuncto ſupervixiſſet.

And therein they ſaid true, and the laws of England were the ſame; witneſs the ſucceſſion of Richard II. to Edward III. alſo the laws of Germany, and the ancient Saxons were accordant hereunto; and it was accordingly decided in a trial by battle, (*a*) under Otho the emperor,

(*a*) "This ſpecies of trial (ſays Dr. Blackſtone) is of great antiquity, but much diſuſed; though *ſtill in force* if the parties chuſe to abide by it. This ſeems to have owed its original to the military ſpirit of our anceſtors, joined to a ſuperſtitious frame of mind; it being in the nature of an appeal to Providence, under an apprehenſion and hope (however preſumptuous and unwarrantable) that Heaven would give the victory to him who had the right." Blac. Com. 3 v. 337. It was introduced in England by William the conqueror. LL. Will. cap. 68. In what caſes uſed, ſee Black. Com. ibid. and 4 v. 346. ſeq. See alſo Barring. on Stat. 202, 294. ſeq. For the foundation and univerſality of this mode of trial, ſee Dr. Robertſ. Hiſt. Cha. V. 1 v. 68. 92. ſeq. It was authorized by the eccleſiaſtics, Id. 357.

as we are told by Radulphus, de diceto ſub anno 945. And ſuch are the laws of France to this day; vide Chopimus de domanio Franciæ, lib. 2. tit. 12. And ſuch were the ancient cuſtoms of the Normans, as we are told by the grand Contumier, cap. 99. And ſuch is the law of Normandy, and of the iſles of Jerſey and Guernſey, (which ſome time were parcel thereof) at this day, as is agreed by Terrier, the beſt expoſitor of their cuſtoms, lib. 2. cap. 2. And ſo it was adjudged within my remembrance, in the iſle of Jerſey, in a controverſy there, between John Perchard and John Rowland, for the goods and eſtate of Peter Perchard.

But nevertheleſs, John the uncle of Arthur came by force and power, et rotomagum gladio ducatus Normanniæ accinctus eſt per miniſterium rotomagenſis archiepiſcopi, as Matthew Paris ſays; and ſhortly after alſo uſurped the crown of England, and impriſoned his nephew Arthur, who died in the year 1202, being as was ſuppoſed murdered by his ſaid uncle; vide Matthew Paris, in fine regni regis Rici' primi, and Walſingham in his Ypodigma Neuſtriæ ſub eodem anno 1202. (*b*)

And

(*b*) Mr. Hume, in treating of the death of this unhappy prince, obſerves, that the circumſtances, which attended this deed of darkneſs, were, no doubt, carefully concealed by the actors, and are variouſly related by hiſtorians: but the moſt probable account is as follows. The king, it is ſaid, firſt propoſed to William de la Brave, one of his ſervants, to diſpatch Arthur; but William replied, that he was a gentleman, not a hangman; and he poſitively refuſed compliance. Another inſtrument of murder was found, and was diſpatched with proper orders to Falaiſe; but Hubert de Bourg, chamberlain to the king, and conſtable of the caſtle, feigning, that he himſelf would execute the king's mandate, ſent back the aſſaſin, ſpread the report that the young prince was dead, and publickly performed all the ceremonies of his interment: but finding, that the Bretons vowed vengeance for the murder, and that all the revolted barons perſevered more obſtinately in their rebellion, he thought it prudent to reveal the ſecret, and to inform the world, that the duke of Brittany was ſtill alive, and in his cuſtody. This diſcovery proved fatal to the young prince; John firſt removed him to the caſtle of Roüen, and, coming in a boat, during the night-time, to that place, commanded Arthur to be brought forth to him. The young prince, aware of his danger, and now more ſubdued by the continuance of his misfortunes, and by the approach of death, threw himſelf on his knees before his uncle, and begged for mercy: but

And to countenance his uſurpation in Normandy, and to give himſelf the better pretence of title, he by his power ſo far prevailed there, that HE OBTAINED A CHANGE OF THE LAW THERE, purely to ſerve his turn; by transferring the right of inheritance from the ſon of the elder brother, to the younger brother; as appears by the grand Contumier, cap. 99. But withal, the gloſs takes notice of it as an INNOVATION, and brought in by men of power, though it mentions not the particular reaſon, which was as aforeſaid.

The king of France, of whom the dutchy of Normandy was holden, highly reſented the injury done by king John to his nephew Arthur; who, as was ſtrongly ſuſpected, came not fairly to his end. He ſummoned king John, as duke of Normandy, into France, to give an account of his actions; and upon his default of appearing, he was by king Philip of France forejudged of the ſaid dutchy; vide Mat. Paris, in initio regni Johannis; and this ſentence was ſo effectually put in execution, that in the year 1204, Mat. Paris tells us, tota Normannia, Turania Andegavia, & Pictavia cum civitatibus & caſtellis & rebus aliis præter rupellam, toar, & mar caſtellam ſunt in regis Francorum dominium devoluta. (*b*)

But yet he retained, though with much difficulty, the iſlands of Jerſey and Guernſey, and the uninterrupted poſſeſſion of ſome parts of Normandy for ſome time after; and both he and his ſon king Hen. III. kept the ſtile and title of dukes of Normandy, &c. 'till the 43d year of king Hen. 3. at which time—for 3000 livres tournois, and upon ſome other agreements, he reſigned Normandy and Anjou to the king of France, (*d*) and never afterwards uſed that title, as appears by the continuation of Mat. Paris, ſub anno 1260; only the four iſlands, ſome time parcel of Normandy, were ſtill, and to this day are, enjoyed by the crown of England, viz. Jerſey, Guernſey, Sarke, and

but the barbarous tyrant, making no reply, ſtabbed him with his own hands; and, faſtening a ſtone to the dead body, threw it into the Seine.—Hume's Hiſt. 2 v. oct. 48.

(*c*) See W. Heming. 455. M. Weſt. 264. Knyghton, 2420. Trivet, 144. Gul. Britto, l. 7. Ann. Waverl. 168.

(*d*) Vide Rymer, vol. 1. 675. M. Paris, 566 Chron. T. Wykes, 53. Trivet, 208. M. Weſtm. 371.

Aldernay, though they are ſtill governed under their ancient Norman laws. (e)

Secondly, as to the ſecond enquiry, what evidence we have touching the laws of Normandy: the beſt, and indeed only common evidence of the ancient cuſtoms and laws of Normandy, is that book which is called, the grand Contumier of Normandy, which in later years has been illuſtrated, not only with a latin and french gloſs, but alſo with the commentaries of Terrier, a French author.

This book does not only contain many of the ancienter laws of Normandy, but moſt plainly it contains thoſe laws and cuſtoms which were in uſe here, in the time of king Hen. II. king Rich. I. and king John; yea, and ſuch alſo, as were in uſe and practice in that country after the ſeparation of Normandy from the crown of England; for we ſhall find therein, in their writs and proceſſes, frequent mention of king Rich. I. and the entire text of the 110th chapter thereof, is an edict of Philip king of France, after the ſeverance of Normandy from the crown of England. I ſpeak not of thoſe additional edicts, which are annexed to that book, of a far later date. So that we are not to take that book as a collection of the laws of Normandy, as they ſtood BEFORE the acceſſion or union thereof to the crown of England; but, as they ſtood LONG AFTER, under the time of thoſe dukes of Normandy that ſucceeded William I. and it ſeems to be a collection made AFTER the time of king Henry III. or, at leaſt, AFTER the time of king John; and conſequently it ſtates their laws and cuſtoms as they ſtood in uſe and practice about the time of that collection made, which obſervation will be of uſe in the enſuing diſcourſe.

Thirdly, touching the third particular, viz. the agreement and diſparity of the laws of England and Normandy. It is very true, we ſhall find a great ſuitableneſs in their laws, in many things agreeing with the laws of England; eſpecially as they ſtood in the time of king Henry II.—the beſt indication whereof we have in the collection of Glanville; the rules of diſcents, of writs, of proceſs, of trials, and ſome other particulars, holding a great analogy

(e) Vide poſt. cap. 9.

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in both dominions, yet not without their differences and diſparities in many particulars, *(f)* viz.

Firſt, ſome of thoſe laws are ſuch as were never uſed in England; for inſtance, there was in Normandy a certain tribute paid to the duke, called Monya, i. e. a certain ſum yielded to him, in conſideration that he ſhould not alter their coin, payable every three years. Vide Contumier, cap. 15. But this payment was never admitted in England; indeed it was taken for a time, but was ouſted by the firſt law of king Henry I. as an uſurpation. Again, by the cuſtom of Normandy, the lands deſcended to the baſtard eigne, born before marriage of the ſame woman, by whom the ſame man had other children after marriage. Contumier, cap. 27. But the laws of England were always contrary, as appears by Glanville, lib. 7. cap. 13. And the ſtatute of Merton, which ſays, Nolumus leges Anglicanas mutare, &c. Again, by the laws of Normandy, if a man died without iſſue, or brother, or ſiſter, the lands did deſcend to the father. Contumier, cap. 15. Terrier, cap. 2. But in England, this law ſeems never to have been uſed.

Secondly, again, ſome laws were uſed in Normandy, which were in uſe in England LONG BEFORE the ſuppoſed Norman conqueſt, and therefore could in no poſſibility have their original force, or any binding power here, upon that pretence: for inſtance, it appears by the Cuſtumier of Normandy, that the ſheriff of the county was an annual officer, and ſo 'tis evident he was likewiſe in England before the conqueſt: and among the laws of Edward the confeſſor, it is provided, quod aldermanni in civitatibus eandem habeant dignitatem qualem habent ballivi hundredorum in ballivis ſuis ſub vicecomitem: again, wreck of the ſea, and treaſure trove, was a prerogative belonging to the dukes of Normandy, as appears by the Contumier, cap. 17, & 18.—and ſo it was belonging to the crown of England before the conqueſt, as appears by the charter of Edward the confeſſor to the abbey of Ramſey, of the manor of Ringſtede, cum toto ejectu maris quod wreccum dicitur, and the like; vide ibid. of treaſure trove, & vide the laws of Edward

(f) Vide Sulliv. Lect. xxix.

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the confeſſor, cap. 14. So fealty, homage, and relief, were incident to tenures by the laws of Normandy. Vide Contumier, cap. 29. And ſo they were in England BEFORE the conqueſt; as appears by the laws of Edward the confeſſor, cap. 35. and the laws of Canutus, mentioned by Brompton, cap. 8.—So the trial by jury of twelve men, was the USUAL trial among the Normans, in moſt ſuits, eſpecially in aſſizes, & juris utrum, as appears by the Contumier, cap. 92, 93, & 94. and THAT TRIAL WAS IN USE HERE IN ENGLAND BEFORE THE CONQUEST, as appears in Brompton among the laws of king Elthred, cap. 3. which gives ſome ſpecimen of it, viz. Habeant placita in ſingulis wapentachiis & exeant ſeniores duodecim thani vel præpoſitus cum iis & jurent quod neminem innocentem accuſare nec noxium concelare. (*g*)

Thirdly, again, in ſome things, though both the law of Normandy and the law of England agreed in the fact, and in the manner of proceeding, yet there was an apparent diſcrimination in their law from ours: — as for inſtance, the huſband ſeiſed in right of the wife, having iſſue by her, and ſhe dying, by the cuſtom of Normandy he held—but only during his widowhood. Contumier, cap. 119. But in England, he held during his life by the curteſy of England.

Fourthly, but in ſome things the laws of Normandy agreed with the laws of England, eſpecially as they ſtood in the times of Henry II. and Richard I.—ſo that they ſeem to be, as it were, copies or counterparts one of another; though in many things the laws of England are ſince changed in a great meaſure from what they then were. For inſtance, at this day in England, and for very many ages paſt, all lands of inheritance, as well ſocage tenures, as of knights ſervice, deſcend to the eldeſt ſon (*b*); unleſs in Kent, and ſome other places, where the cuſtom directs the deſcent to ALL the males, and in ſome places to the youngeſt; but the ancient law uſed in England, though it directed knights ſervices and ſerjeanties to deſcend to the eldeſt ſon, yet it directed vaſſalages and ſoccage lands to deſcend to all the ſons; Glanvil. lib. 7. cap. 3. and ſo do

(*g*) Vide poſt. cap. 12. (*b*) Vide poſt. cap. 11,

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the laws of Normandy to this day. Vide Contumier, cap. 26. & poſt hic, cap. 11.

Again, leproſy AT THIS DAY, does not impede the deſcent; but by the laws in uſe in England, in the elder times, unto the time of king John, and for ſome time afterwards, leproſy DID IMPEDE the deſcent, as placito quarto Johannis, in the caſe of W. Fulch, a judge of that time; and accordingly were the laws of Normandy. Vide Le Contumier, cap. 27. and the 11th chapter of this hiſtory.

Again, at this day, by the law of England, in caſes of trials by twelve men, ALL OUGHT TO AGREE, and any one diſſenting, no verdict can be given; but by the laws of Normandy, though a verdict ought to be by the concurring conſent of twelve men, yet in caſe of diſſent, or diſagreement, of the jury, they uſed to put off the leſſer number that were diſſenters, and added a kind of tales equal to the greater number ſo agreeing, until they had got a verdict of twelve men that concurred. Contumier, c. 95 (*i*). And we may find ſome ancient footſteps of the like uſe HERE in England, though long ſince antiquated; vide Bracton, lib. 4. cap. 19. where he ſpeaks thus,— "Contingit etiam multotiens quod juratores in veritate dicenda ſunt ſibi contrarii ita quod in unam concordare non poſſunt ſententiam, quo caſu de conſilio curiæ affortietur aſſiſa, ita quod apponantur alii juxta numerum majoris partis quæ diſſenſerit, vel ſaltem quatuor vel ſex & adjungantur aliis, vel etiam per ſeipſos ſine aliis, de veritate diſcutiant & judicent, & per ſe reſpondeant & eorum veredictum allocabitur & tenebitur cum quibus ipſi convenirent."

Again, at this day, by the laws of England, a man may give his lands in FEE-SIMPLE, which he has by deſcent, to any one of his children, and diſinherit the reſt: but by the ancient laws uſed here, it ſeems to be otherwiſe; as Mich. 10. Johannis, Glanv. lib. 7. cap. 2. the caſe of William de Cauſeia. And accordingly were the laws of Normandy, as we find in the Grand Contumier, cap. 36. "Quand le pere avoit pluſieurs fills, ils ne peut fairde de ſon he-

(*i*) Vide poſt. cap. 12.

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" ritage le un meilleur que le auter;" and yet it ſeems to this day, in England, it holds ſome reſemblance in caſes of frank-marriage; viz. that the doneſs, in caſe ſhe will have any part of her father's other lands, ought to put her lands in hotchpot (*k*).

Again, by the law of England, the younger brother ſhall NOT exclude the ſon of the elder, who died in the life-time of the father: and this was the ancient law of Normandy, but received ſome interruption in favour of king John's claim. Vide Contumier, cap. 25. & hic ante. And indeed, generally, the rule of deſcents in Normandy, was the SAME, in MOST caſes, with that of deſcents with us at this day; as for inſtance, that the deſcent of the line of the father ſhall not reſort to that of the mother, et e converſo; and that the courſe was otherwiſe in caſes of purchaſes. But in moſt things the law of Normandy was conſonant to the law with us, as it was in the time of king Richard I. and king John; except in caſes of deſcents to baſtard eigne, excluding mulier puiſne, as aforeſaid (*l*).

Again, at this day there are many writs now in uſe which were anciently alſo in uſe here, as well as in Normandy: as writs of rights, writs of dower, writs de novel diſſeiſin, de mortdanceſtor, juris utrum, darrein preſentment, &c. And ſome that are now out of uſe, though anciently in uſe here in England; as writs de feodo vel vado, de feodo vel warda, &c. All which are taken notice of by Glanville, lib. 13. cap. 27, 28, 29. And the very ſame forms of writs in effect were in uſe in Normandy, as appears by the Contumier per totum;—and the writ de feodo vel vado (ibid. cap. 11.) according to Glanville, lib. 13. cap. 27. runs thus, viz. Rex vicecomiti ſalutem: ſummone per bonos ſummonitores duodecim liberos & legales homines de vicineto quod ſint coram me vel juſticiis meis eo die parati ſacramento recognoſcere utrum N. teneat unam carucatam terræ in illa villa quæ R. clamat verſus eum per breve meum in feodo an in vadio, invadiatem ei ab ipſo R. vel ab H.

(*k*) See Lit. Sect. 17, 19, 20. Sec. 266 to 275. Ib. 292. Bract. l. 2. c 34. Brit. c. 72.

(*l*) As to *baſtard eigné* and *mulier puiſné*, ſee Glanv. l. 7. c. 1. Lit. Sect. 399, 400. Co. Lit. 244.—For a conciſe explication of the terms, ſee Blac. Com. 2 v. 248.

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anteceſſore ejus, vel aliter ſi ſit feodam vel hæreditas ipſius N. an in vadia invadiata ei ab ipſo R. vel ab H. &c. Et interim terram illam videant, &c. vide ibid.

And according to the grand Contumier, that writ runs thus, viz. Si rex fecerit te ſecurum de clamore ſuo proſequend' ſummoneas recognitores de viceneto quod ſint ad primas aſſiſas ballivæ, ad cognoſcendum utrum carucata terræ in B. quod. G. deforceat R. ſit feodum tenentis vel vadium novum dictum per manus G. poſt coronationem regis Richardi & pro quanta, & utrum ſit propinquior hæres ad redimendum vadium, & videatur interum terræ, &c. So that there ſeems little variance, either in the nature, or, in the form, of thoſe writs uſed here in the time of Henry II. And thoſe uſed in Normandy when the Contumier was made.

Again, the uſe was in England to limit certain NOTABLE times within the compaſs of which, thoſe titles which men deſigned to be relieved upon, muſt accrue: thus it was done in the time of Henry III. by the ſtatute of Merton, cap. 8.—at which time the limitation in a writ of right was from the time of king Henry I.—and by that ſtatute it is reduced to the time of king Henry II.—and for aſſizes of Mortdanceſtor, they were thereby reduced from the laſt return of king John out of Ireland; which was 12 Johannis;—and for aſſizes of novel diſſeiſin, a prima transfretatione regis in Normanniam; which was 5 Henry III.—and which before that, had been poſt ultimum redditum Henricus III. de Britannia, as appears by Bracton. And this time of limitation was alſo afterwards, by the ſtatutes of Weſtm. I. cap. 39. and Weſt. 2. cap. 2. 46. reduced unto a narrow ſcantlet, the writ of right being limited, to the firſt coronation of king Richard I.

But before the limitation ſet by that ſtatute of Merton, there were ſeveral limitations ſet for ſeverals writs; for we find among the pleas of king John's time, the limitation of writs, de tempore quo rex Henricus avus noſter fuit vivus & mortuus; and in a writ of aile, die quo rex Henricus obiit in the time of Henry II. as appears by Glanville, lib. 13. cap. 3.—there were then divers limitations in uſe, as in Mortdanceſtor,—poſt prima coronationem noſtram, viz. Henrici ſecundi, Glanvil. lib. 1. cap. 1.—and touching

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aſſizes of novel diſſeiſin, vide ibid. cap. 32. where he tells us, cum quis intra aſſiſam, &c. And the time of limitation in an aſſize, was then poſt ultimam meam transfretationem, (viz. Henrici primi) in Normanniam, lib. 13. cap. 33. But in a writ of right, as alſo in a writ of cuſtoms and ſervices, it was de tempore regis Henrici avi mei, viz. Hen. I. vid. ib. lib. 12. cap. 10, 16.—and it ſeems very apparent, that the limitations anciently in Normandy, for all actions anceſtral, was poſt primam coronationem regis Henrici ſecundi, as appears expreſly in the Contumier, cap. 111. de feoſe & gage.

So that anciently, the time of limitation in Normandy, was the ſame as in England, and indeed borrowed from England; viz. In all actions anceſtrel, from the coronation of Henry II. And thus, in thoſe actions wherein the limitation was anciently from the coronation of king Richard I.—was ſubſtituted; as, in the writ de feoſe & gage, in the Contumier, cap. 111. De feoſe & forme, cap. 112. In the writ de ley appariſan, ib. cap. 24. & cap. 22. Aſcum gage ne peut eſtre requiſe en Normandy, ſi il ne fuit engage poſt le coronement de roy Richard ou deins quarante annus: ſo that the old limitation, as well for the redemption of mortgages, as for bringing thoſe writs above-mentioned, was poſt coronationem regis Henrici ſecundi; but altered, as it ſeems, by king Philip, the ſon of Lewis king of France, after king John's ejectment out of Normandy; and ſince the time from the coronation of king Richard I. is eſtimated to bear proportion to 40 years. It is probable this change of the limitation by king Philip of France, was about the beginning of the reign of king Henry III.—or about 30 or 40 years after the coronation of Richard I.—from whoſe coronation about 30 years were elapſed, 5 aut 6 Henrici III. for anciently the limitation in this caſe was 30 years.

Fourthly, I now come to the fourth inquiry; viz. how this great parity between the laws of England and Normandy came to be effected; and before I come to it, I ſhall premiſe two obſervables,—which I would have the reader to carry along with him through the whole diſcourſe, viz.—Firſt, that this parity of laws does not at all infer a neceſſity, that they ſhould be impoſed by the conqueror, which is ſufficiently ſhewn in the foregoing chapters; and in this

it will appear, that there were divers other means that cauſed a ſimilitude of both laws, without any ſuppoſition of impoſing them by the conqueror. Secondly, that the laws of Normandy were, in the greater part thereof, BORROWED from ours, rather than ours from them; and the ſimilitude of the laws of both countries did in a greater meaſure ariſe from THEIR imitation of our laws, rather than from our imitation of theirs; though there can't be denied but that a reciprocal imitation of each others laws was, in ſome meaſure at leaſt, had in both dominions: and theſe two things being premiſed, I deſcend to the means whereby this parity or ſimilitude of the laws of both countries did ariſe, as follow, viz.

Firſt, Mr. Camden and ſome others have thought, there was ever ſome congruity between the ancient cuſtoms of this iſland and thoſe of the country of France, both in matters religious and civil; and tells us of the ancient druids, who were THE COMMON INSTRUCTORS OF BOTH COUNTRIES (*m*). Gallia cauſidicos docuit facunda Britannos. And ſome have thought, that anciently, both countries were conjoined by a ſmall neck of land, which might make an eaſier tranſition of the cuſtoms of either country, to the other; but thoſe things are too remote conjectures, and we need them not to ſolve the congruity of laws between England and Normandy. Therefore,

Secondly, it ſeems plain, that before the Normans coming in, in way of hoſtility, there was a great intercourſe of commerce and trade, and a mutual communication, between thoſe two countries; and the conſanguinity between the two princes gave opportunities of ſeveral interviews

(*m*) The druids, of whom much notice has been taken by hiſtorians, have been repreſented by ſome, as perſons of learning, derived to them by long tradition. They were reſpected and admired, not only for knowing more than others but for deſpiſing what all others valued and purſued.—By their virtue and their temperance, they reproved and corrected thoſe vices in others, from which they were themſelves happily free; and made uſe of no other arms, than the reverence due to integrity, to enforce obedience to their own commands. Hence they derived ſo much authority, that they were not only prieſts, but judges alſo:—no laws were inſtituted without their approbation; nor any perſon puniſhed, but by their condemnation.

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between them and their courts, in each others countries: and it is evident by hiſtory, that the confeſſor, before his acceſſion to the crown, made a long ſtay in Normandy, and was there often; which of conſequence muſt have drawn many of the Engliſh thither, and of the Normans hither; all which might be a means of their mutual underſtanding of the cuſtoms and laws of each others country; and gave opportunities of incorporating and ingrafting divers of them into each other, as they were found uſeful or convenient; and therefore, the author of the prologue to the Grand Cuſtumier, thinks it more probable, that the laws of Normandy were derived from England, than that ours were derived from thence.

Thirdly, it is evident, that when the duke of Normandy came in, he brought over a great multitude, not only of ordinary ſoldiers, but of the beſt of the nobility and gentry of Normandy; hither they brought their families, language and cuſtoms, and the victor uſed all his art and induſtry to incorporate them into this kingdom: and, the more effectually to make both people become one nation, he made marriages between the Engliſh and Normans;—tranſplanting many Norman families hither, and many Engliſh families thither;—he kept his court ſometimes here, and ſometimes there; and by thoſe means inſenſibly derived many Norman cuſtoms hither, and Engliſh cuſtoms thither, without any ſevere impoſition of laws on the Engliſh as conqueror: and by this method he might eaſily prevail to bring in, even without the peoples conſent, ſome cuſtoms and laws that perhaps were of foreign growth; which might the more eaſily be done, conſidering how in a ſhort time the people of both nations were intermingled;—they were mingled in marriages, in families, in the church, in the ſtate, in the court, and in councils; yea, and in parliaments in both dominions;—though Normandy became, as it were, an appendix to England, which was the nobler dominion, and received a greater conformity of their laws to the Engliſh, than they gave to it.

Fourthly, but the greateſt means of the aſſimilation of the laws of both kingdoms was this: the kings of England continued dukes of Normandy till king John's time, and he kept ſome footing there, notwithſtanding the confiſcation thereof

thereof by the king of France, as aforeſaid; and during all this time, England, which was AN ABSOLUTE MONARCHY, had the prelation, or preference, before Normandy, which was but a FEUDAL DUTCHY, and a ſmall thing in reſpect of England; and by this means Normandy became, as it were, an appendant to England, and ſucceſſively received its laws and government from England; which had a greater influence on Normandy than THAT could have on England; inſomuch, that oftentimes there iſſued precepts into Normandy, to ſummon perſons there to anſwer in civil cauſes here; yea, even for lands and poſſeſſions in Normandy; as placito 1 Johannis;—a precept iſſued to the ſeneſchal of Normandy, to ſummon Robert Jeronymus, to anſwer to John Marſhal, in a plea of land, giving him 40 days warning; to which the tenant appeared, and pleaded a recovery in Normandy: and the like precept iſſued for William de Boſco, againſt Jeoffry Ruſham, for lands in Corbeſpine in Normandy.

And on the other ſide, Trin. 14 Johannis, in a ſuit between Francis Borne and Thomas Adorne, for certain lands in Ford. The defendant pleaded a concord made in Normandy in the time of king Richard I. upon a ſuit there before the king, for the honour of Bonn in Normandy, and for certain lands in England, whereof the lands in queſtion were parcel, before the ſeneſchal of Normandy, anno 1099. But it was excepted againſt, as an inſufficient fine, and varying in form from other fines; and therefore the defendant relied upon it as a releaſe.

By theſe, and many the like inſtances, it appears as follows, viz.

Firſt, that there was a great intercourſe between England and Normandy before and after the conqueror, which might give a great opportunity of an aſſimilation and conformity of the laws in both countries. Secondly, that a much greater conformation of laws aroſe AFTER the conqueror, during the time that Normandy was enjoyed by the crown of England, than before. And thirdly, that this ſimilitude of the laws of England and Normandy, was not by conformation of the laws of England to thoſe of

Normandy, but by conformation of the laws of Normandy to thoſe of England,—which now grew to a great height, perfection and glory; ſo that Normandy became but a perquiſite, or appendant, of it.

And as the reaſon of the thing ſpeaks it, ſo the very fact itſelf atteſts it; for—

Firſt, it is apparent, that in point of limitation in actions anceſtrel, from the time of the coronation of king Henry II. it was anciently ſo here in England in Glanville's time, and was tranſmitted from hence into Normandy; for it is no way reaſonable to ſuppoſe the contrary, ſince Glanville mentions it to be enacted here, concilio procerum; and though this be but a ſingle point, or inſtance, yet the evidence thereof makes out a criterion, or probable indication, that many other laws were in like manner ſo ſent hence into Normandy.

Secondly, it appears, that in the ſucceſſion of the kings of England, from king William I. to king Henry II.—the laws of England received a great improvement and perfection, as will plainly appear from Glanville's book, written in the time of king Henry II.—eſpecially if compared with thoſe ſums, or collections, of laws, either of Edward the confeſſor, William I. or Henry I. whereof hereafter.

So that it ſeems, by uſe, practice, commerce, ſtudy and improvement of the Engliſh people, they arrived in Henry the ſecond's time to a greater improvement of the laws; and that in the time of king Richard I. and king John, they were more perfected, as may be ſeen in the pleadings, eſpecially of king John's time: and though far inferior to thoſe of the times of ſucceeding kings, yet they are far more regular and perfect than thoſe that went before them. And now if any do but compare the Contumier of Normandy, with the tract of Glanville, he will plainly find that the Norman tract of laws followed the pattern of Glanville, and was writ LONG AFTER it, when poſſibly the Engliſh laws were yet more refined and more perfect; for it is plain beyond contradiction, that the collection of the cuſtoms and laws of Normandy was made after the time of king Henry II.—for it mentions his coronation, and appoints it for the limitation of actions anceſtrel,—which muſt at leaſt have been 30 years

years after; nay, the Contumier appears to have been made after the act of ſettlement of Normandy in the crown of France; for therein is ſpecified the inſtitution of Philip king of France, for appointing the coronation of king Richard I. for the limitation of actions, which was AFTER the ſaid Philip's full poſſeſſion of Normandy.

Indeed, if thoſe laws and cuſtoms of Normandy had been a collection of the laws they had had there BEFORE the coming in of king William I.—it might have been a probability that their laws, being ſo near like ours, might have been tranſplanted from thence hither; but the caſe is viſibly otherwiſe; for the Contumier is a collection AFTER the time of king Richard I. yea, after the time of king John, and POSSIBLY AFTER Henry the third's time, when it had received ſeveral repairings, amendments and poliſhings, under the ſeveral kings of England, William I. William II. Henry I. king Stephen, Henry II. Richard I. and king John; who were either knowing themſelves in the laws of England, or were aſſiſted with a council that were knowing therein.

And as in this tract of time the laws of England received a great advance and perfection, as appears by that excellent collection of Glanville, written even in Henry the ſecond's time (*n*), when yet there were near thirty years to acquire unto a further improvement before Normandy was loſt; ſo from the laws of England, thus modelled, poliſhed and perfected, the ſame draughts were drawn upon the laws of Normandy, which received the faireſt lines from the laws of England, as they ſtood at leaſt in the beginning of king John's time; and were in effect in a great meaſure the defloration of the Engliſh laws, and a tranſcript of them, though mingled and interlarded with many particular laws and cuſtoms of their own, which altered the features of the original in many points.

(*n*) Vide poſt. cap. 7. note (*m*).

CHAP. VII.

Concerning the progreſs of the laws of England *after the time of king* William I. *until the time of king* Edward II.

THAT which precedes in the two foregoing chapters, gives us ſome account of the laws of England, as they ſtood in and after THE GREAT CHANGE which happened under king William I. commonly called the conqueror. I ſhall now proceed to the hiſtory thereof in the enſuing times, until the reign of king Edward II (*a*).

William I. having three ſons; Robert the eldeſt, William the next, and Henry the youngeſt, diſpoſed of the crown of England to William his ſecond ſon (*b*), and the dutchy of Normandy to Robert (*c*), his eldeſt ſon; and accordingly William II. commonly called William Rufus, ſucceeded his father in this kingdom. We have little memorable of him in relation to the laws, only that he ſeverely preſſed and extended the foreſt laws.

Henry I. ſon of William I. and brother of William II. ſucceeded his ſaid brother in the kingdom of England, and afterwards expelled his eldeſt brother Robert out of the dutchy of Normandy alſo. He proceeded much in the benefit of the laws, viz.

Firſt, he reſtored the free election of biſhops and abbots, which before that time he and his predeceſſors inveſted,

(*a*) See the laſt chapter of Mr. Juſtice Blackſtone's Commentaries on "the riſe, progreſs, and gradual improvements, of the laws of England;" from the earlieſt times to the Norman conqueſt; from the Norman conqueſt to the reign of Edward I.; from thence to the reformation; from the reformation to the reſtoration of Charles II.; from thence to the revolution in 1688; and from the revolution to the preſent time.

(*b*) William the conqueror, in his laſt illneſs, wrote to Lanfranc, archbiſhop of Canterbury, deſiring him to crown William, his ſecond ſon, king of England. Gul. Gemet. p. 292. Order. Vital. p. 659. Chron. de Mailr. p. 161. Malmeſ. p. 112. H. Hunt. p. 371. Hoveden, p. 460. M. Weſtm. p. 230.

(*c*) He left HIM Normandy and Maine, and bequeathed to Henry nothing but the poſſeſſions of his mother Matilda; but foretold, that he would, one day, ſurpaſs both his brothers in power and opulence. Order. Vital. 659. Gul. Newbr. 357. Fragm. de Gul. Conq. 32.

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per annulum & bacculum; yet reſerving thoſe three enſigns of the patronage thereof, viz. conge d' eſlire, cuſtody of the temporalties, and homage upon their reſtitution. Vide Hoveden, in vita ſua, and Black. Com. 4 v. 421.

But ſecondly, the great eſſay he made, was the compoſing an abſtract or manual of laws, wherein he confirmed the laws of Edward the confeſſor, cum illis emendationibus quibus eam pater meus emendavit baronum ſuorum concilio; and then adds his own laws, ſome whereof ſeem to taſte of the canon law. (*d*) The whole collection is tranſcribed in the red book of the exchequer; from whence it is now printed in the end of Lambard's ſaxon laws, and therefore not needful to be here repeated.

They, for the moſt part, contain a model of proceedings in the county courts, the hundred courts, and the courts leet; the former to be held twelve times in the year, the later twice; and alſo of the courts baron. Theſe were the ordinary uſual courts, wherein juſtice was then, and for a long time after, moſt commonly adminiſtered;—alſo they concern criminal proceedings, and the puniſhment of crimes, and ſome few things touching civil actions and intereſts, as in chapter 70, directing deſcents, viz.

Si quis ſine liberis deceſſerit pater aut mater ejus in Hereditatem ſuccedant, vel frater vel ſoror, ſi pater & mater deſint; ſi nec hos habeat, frater vel ſoror patris vel matris, & deinceps in quintum genetalium, qui cum propiores in parentela ſint hereditario jure ſuccedant; et dum virilis ſexus extiterit & hæreditas ab inde fit femina non hæreditetur; primum patris feodum primogenitus filius habeat. Emptiones vero & deinceps acquiſitiones det cui magis velit, ſed ſi Bockland habeat quam ei parentes dederint, mittat eam extra cognationem ſuam. (*e*)

I have obſerved and inſerted this law, for two reaſons, viz. firſt, to juſtify what I before ſaid, that the laws of

(*d*) There is a code, which paſſes under the name of Henry I. but the beſt antiquarians have agreed not to think it genuine. It is, however, a very ancient compilation, and may be uſeful to inſtruct us in the manners and cuſtoms of the times.

(*e*) Vide Blac. Com. 4 v. 421.

Normandy took the Engliſh laws for their pattern in many things; vide le Contumier, cap. 25, 26, 36, &c. And ſecondly, to ſee how much the laws of England grew and increaſed in their particularity and application between this time and the laws of William I. which in chapter 36, has no more touching deſcents than this, viz.—Si quis inteſtatus obierit, liberi ejus hæreditatem equaliter dividant. But proceſs of time grafted thereupon, and made particular proviſions for particular caſes, and added diſtributions and ſubdiviſions to thoſe general rules.

Theſe laws of king Henry I. are a kind of miſcellany, made up of thoſe ancient laws, called, the laws of the confeſſor, and king William I. and of certain parts of the canon and civil law, and of other proviſions, that cuſtom and the prudence of the king and council had thought upon, choſen, and put together.

King Stephen ſucceeded, BY WAY OF USURPATION, upon Maud the ſole daughter and heir of king Henry I. (*f*) The laws of Henry I. grew tedious and ungrateful to the people, partly becauſe new, and ſo not ſo well known, and partly becauſe more difficult and ſevere than thoſe ancient laws, called, the confeſſor's; for Walſingham, in his Ypodigma Neuſtriæ, tells us, that the Londoners petitioned queen Maud,—ut liceret eis uti legibus ſancti Edvardi &

(*f*) Matilda, or, as Hale nominates her, Maud, was the only legitimate iſſue of Henry I. and whom he betrothed to the emperor Henry V. but he dying without iſſue, Henry beſtowed her on Geoffrey, the eldeſt ſon of Fulk, count of Anjou. Though Henry by his will left his daughter Matilda all his dominions, (W. Malmſ. 178.) yet, independent of that diſpoſition, ſhe was moſt unqueſtionably heir to the kingdom of England. In the progreſs and ſettlement of the feudal law, the male ſucceſſion to fiefs had taken place ſome time before the female was admitted; and eſtates being conſidered as military benefices, not as property, were tranſmitted to ſuch only as could ſerve in the armies, and perform in perſon, the conditions upon which they were originally granted. But after that the continuance of rights, during ſome generations, in the ſame family, had, in ſome meaſure, obliterated the primitive idea, the females were gradually admitted to the poſſeſſion of feudal property; and the ſame revolution of principles, which procured them the inheritance of private eſtates, naturally introduced their ſucceſſion to government and authority. The failure, therefore, of male heirs, to the kingdom of England and duchy of Normandy, ſeemed to leave the ſucceſſion open, without a rival, to Matilda.

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non legibus patris ſui Henrici, qua graves erant; (*g*) and that her refuſal gave occaſion to their defection from her, and ſtrengthened Stephen in his uſurpation; who according to the method of uſurpers, to ſecure himſelf on the throne, was willing and ready to gratify the deſires of the people herein; and furthermore, took his oath, that he would not retain in his hands the temporalties of the biſhops: that he would remit the ſeverity of the foreſt laws; and that he would alſo remit the tribute of Danegelt: (*h*) but he performed nothing.

His times were troubleſome, he did little in relation to the laws; nor have we any memorial of any record touching his proceedings therein, only there are ſome few pipe rolls of his time, relating to the revenue of the crown. (*i*)

Henry II. the ſon of Maud, ſucceeded Stephen, he reigned long, viz. about thirty five years; and though he was not without great troubles and difficulties, yet he built up the laws and the dignity of the kingdom to a great height and perfection. (*k*) For

Firſt,

(*g*) Contin. Flor. Wig. 677. Gervaſe, 1355.

(*h*) Danegelt was a tax impoſed upon land, either for payment of the ſums exacted by the Danes, or for putting the kingdom in a poſture of defence againſt thoſe invaders. Chron. Sax. 128. LL. Edw. con. ſect. 12. This tax, which was ſo generally odious to the nation, was remitted in the ſucceeding reign of Henry II.

(*i*) The advancement of Stephen to the throne procured him neither tranquility nor happineſs; and tho' the ſituation of England prevented the neighbouring ſtates from taking any durable advantage of her confuſions, yet her inteſtine diſorders were to the laſt degree ruinous and deſtructive. The court of Rome, during theſe diſorders, was permitted to make farther advances in her uſurpations; and appeals to the pope, which had been always ſtrictly prohibited by the Engliſh laws, became now common in every eccleſiaſtical controverſy. H. Hunt. 395. From this reign, according to Mr. Juſtice Blackſtone, we are to date the introduction of the Roman civil and canon laws into this realm. Com. 4 v. 421.

(*k*) He was, perhaps, the greateſt prince of his time for wiſdom, for virtue and ability—his character, both in public and in private life, being almoſt without a blemiſh; in truth, he ſeems to have poſſeſſed every accompliſhment, both of body and mind, which makes a man either eſtimable or amiable. He occupied himſelf for ſeveral years in the adminiſtration of juſtice, in the execution of the laws, and in guarding againſt thoſe inconveniences, which either the paſt convulſions of his ſtate, or the poli-

Firſt, in the entrance of his government he ſettled the peace of the kingdom; he alſo reformed the coin, (*l*) which was much adulterated and debaſed in the times and troubles of king Stephen, et leges Henrici avi ſui præcepit per totum regnum inviolabiliter obſervari. Hoveden.

Secondly, againſt the inſolencies and uſurpations of the clergy, he by the advice of his council or parliament at Clarendon, enacted thoſe ſixteen articles mentioned by Mat. Paris, ſub anno 1164. They are long, and therefore I remit you thither for the particulars of them. [A]

'Tis true, Thomas Becket, archbiſhop of Canterbury, boldly and INSOLENTLY took upon him to declare many of thoſe articles void; eſpecially thoſe five mentioned in his epiſtle to his ſuffragans, recorded by Hoveden, viz. firſt, that there ſhould be no appeal to the biſhop without the king's licence. Secondly, that no archbiſhop or biſhop ſhould go over the ſeas at the pope's command without the king's licence. Thirdly, that the biſhop ſhould not excommunicate the king's tenants in capite without the king's licence. Fourthly, that the biſhop ſhould not have the conuzance of perjury, or fidei læſionis. And, fifthly, that the clergy ſhould be convened before lay judges, and that the king's courts ſhould have conuzance of churches and of tythes.

Thirdly, he raiſed up the municipal laws of the kingdom to a greater perfection, and a more orderly and regular adminiſtration than before; 'tis true, we have no record of judicial proceedings ſo ancient as that time, except the pipe rolls in the exchequer, which are only accounts of his revenue: but we need no other evidence hereof than the tractate of Glanville, which though perhaps it was not

political inſtitutions of that age, unavoidably occaſioned. The proviſions, which he made, ſhew ſuch a largeneſs of thought as qualified him to become a legiſlator; and they were commonly calculated for the future as well as for the preſent happineſs of his kingdom. His exactneſs in adminiſtring juſtice had gained him ſo great a reputation, that even foreign and diſtant princes made him an arbiter, and ſubmitted their differences to his judgment. Vide Rymer, vol. 4. 43. Bened. Abb. 172. Diceto, 597. Brompton, 1120.

(*l*) He repaired the coin, which had been extremely debaſed during the reign of his predeceſſor; and took proper meaſures againſt the return of like abuſes. Hoveden, 491.

writ-

written by that Ranulphus de Glanvilla, who was juſtitiarius Angliæ under Henry II. yet it ſeems to be wholly written at that time; (*m*) and by that book, though many parts thereof are at this day antiquated and altered, and in that long courſe of time, which has elapſed ſince that king's reign, much enlarged, reformed, and amended; yet by comparing it with thoſe laws of the confeſſor and conqueror, yea, and the laws of his grandfather king Henry I. which he confirmed; it will eaſily appear, that the rule and order, as well as the adminiſtration of the law, was greatly improved beyond what it was formerly; and we have more footſteps of their agreement and concord herein with the laws, as they were uſed from the time of Edw. I. and downwards, than can be found in all thoſe obſolete laws of Henry I. which indeed were but diſorderly, confuſed and general things;—rather the caſes and ſhells of directing the way of adminiſtration, than inſtitutions of law, if compared with Glanville's tractate of our laws.

Fourthly,—the adminiſtration of the common juſtice of the kingdom, ſeems to be wholly diſpenſed in the county courts, hundred courts, and courts baron; except ſome of the greater crimes reformed by the laws of king Henry I. and that part thereof which was ſometimes taken up by the juſtitiarius Anglicæ: this doubtleſs bred great inconvenience, uncertainty, and variety in the laws, viz.

Firſt, by the IGNORANCE of the judges, which were the freeholders of the county; for although the alderman, or, chief conſtable of every hundred, was always to be a man learned in the laws; and although not only the freeholders, but the biſhops, barons, and great men, were by the

(*m*) Sir Edward Coke (4 Inſt. 345.) ſays, that this book was firſt printed "by the perſuaſion and procurement of ſir William Stanford, a grave and learned judge of the common pleas A. D. 1554. 1 & 2 Ph & M."——"Henricus rex Angliæ pater conſtituit (ſays Hovedsn) Ranulphum de Glanvilla ſummum juſtic. totius Angliæ, cujus ſapientia conditæ ſunt leges ſubſcriptæ quas Anglicanas vocamus." Vide Hov. A.D. 1180. et reg. H. 2. 26. Plowd. 368. Sulliv. Lect. 130, 148, 288. —This book of Glanville's (Tractatus de legibus & conſuetudinibus Angliæ) is ſuppoſed to have been the firſt undertaking of the kind, in any country of Europe. It was compoſed about the year 1181.—Vide Dr. Robertſ. Hiſt. Cha. V. 1 v. oct. 382.

laws

laws of king Henry I. appointed to attend the county court; yet they ſeldom attended, there, or if they did, in proceſs of time they neglected the ſtudy of the Engliſh laws, as great men uſually do.

Secondly, another inconvenience was, that this alſo bred GREAT VARIETY of laws, eſpecially in the ſeveral counties; for the deciſions, or, judgments, being made by divers courts, and ſeveral independant judges and judicatories,—who had no common intereſt among them in their ſeveral judicatories; and thereby in proceſs of time every ſeveral county would have had ſeveral laws, cuſtoms, rules, and forms of proceeding;—which is always the effect of ſeveral independant judicatories, adminiſtred by ſeveral judges.

Thirdly, a third inconvenience was, that all the buſineſs of any moment was carried by parties and factions; for the freeholders being generally the judges, and converſing one among another, and being as it were the chief judges, not only of the fact, but of the law; EVERY MAN THAT HAD A SUIT THERE, SPED ACCORDING AS HE COULD MAKE PARTIES; and men of great power and intereſt in the county did eaſily overbear others in their own cauſes, or in ſuch, wherein they were intereſted; either by relation of kindred, tenure, ſervice, dependance, or application.

And although in caſes of falſe judgment, the law, even as then uſed, provided a remedy by writ of falſe judgment before the king or his chief juſtice; and in caſe the judgment was found to be ſuch in the county court, all the ſuiters were conſiderably amerced, (which alſo continued long after in uſe with ſome ſeverity) yet this proved but an INEFFECTUAL remedy for thoſe miſchiefs.

Therefore the king took another and a more effectual courſe; for in the 22d year of his reign, by advice of his parliament held at Northampton, HE INSTITUTED JUSTICES ITINERANT; dividing the kingdom into ſix circuits, and to every circuit allotting three judges, knowing or experienced in the laws of the realm: (*n*) theſe juſtices with their ſeveral circuits are declared by Hoveden, ſub eodem anno, i. e. 22. H. 2. viz.

(*n*) Vide Blac. Com. 4 v. 422.

"1. Hu-

"1. Hugo Creſſy, Walterus filius Roberti, & Robertus "Maunſel, for Norfolk, Suffolk, Cambridge, Hunting- "don, Bedford, Buckingham, Eſſex, and Hartford coun- "ties.

"2. Hugo de Gundevilla, W. filius Radulphi, & W. "Baſſet, for Lincoln, Nottingham, Derby, Stafford, War- "wick, Northampton, and Leiceſter counties.

"3. Robertus filius Bernardi, Richardus Giffard, & Ro- "gerus filius Ramfrey, for Kent, Surrey, Suſſex, Hamp- "ſhire, Berks, and Oxon counties.

"4. W. filius Stephani, Bertein de Verdun, & Turſtavi "filius Simonis, for Hereford, Glouceſter, Worceſter, and "Salop counties.

"5. Radulphus filius Stephani, W. Ruffus, & Gilbertus "Pipard, for the counties of Wilts, Dorſet, Somerſet, "Devon, and Cornwall.

"6. Robertus de Watts, Radulphus de Glanvilla, & "Robertus Picknot, for the counties of York, Richmond, "Lancaſter, Copland, Weſtmorland, Northumberland, and "Cumberland.

"Hi, (conſilio archiepiſcoporum, epiſcoporum, comi- "tum & baronum regni, &c. apud Nottingham exiſten- "tium) miſſi ſunt per ſingulos Angliæ comitatus & jura- "verunt quod cuilibet jus ſuum conſervarent illæ ſum." Hoveden, fo. 313. & Mat. Paris, in anno 1176. And that theſe men were well known in the law, appears by their companion Radulphus de Glanvilla; who ſeems to have been the author of the treatiſe De Legibus Angliæ, and was afterwards made Juſtitiarius Angliæ.

To thoſe juſtices, was afterwards committed the conuzance of all civil and criminal pleas, happening within their diviſions; and likewiſe pleas of the crown, pleas touching liberties, and the king's rights; and, the better to acquaint them with their buſineſs, there were certain aſſizes which were firſt enacted at Clarendon, and afterwards confirmed at Northampton; they were not much unlike the capitula itineris mentioned in our old magna charta, but are not ſo perfect, and are ſet down by Hoveden ubi ſupra, and are too long to be here inſerted: I ſhall only take notice of this one, viz. eſtabliſhing deſcents, becauſe I ſhall

hereafter have occaſion to uſe it, " Si quis obierit francus " tenens hæredes ipſius remaneant in talem ſeiſina qualem " pater ſuus, &c."

But beſides thoſe courts in eyre, there were two great ſtanding courts, viz. the exchequer and the court of king's bench, vel curiam coram ipſo rege, vel ejus juſticiario; and it was provided by the above-mentioned aſſiſæ,—" Quod " juſticiæ faciant omnes juſticias & rectitudines ſpectantes " ad dominium regis, & ad coronam ſuam, per breve do- " mini regis vel illorum qui in ejus loco erunt de feodo " dimidii militis & infra, niſi tam grandis ſit quærela quod " non poſſit deduci ſine domino rege vel talis quam juſti- " ciæ ei reponunt pro dubitatione ſua, vel ad illos qui in " loco ejus erunt, &c."

Neither do I find any diſtinct mention of the court of common bench in the time of this king, though in the time of king John there is often mention made thereof, and the rolls of that court of king John's time are yet extant upon record. Vide poſt. ſub Richardi primi [B].

The limitation of the aſſiſe of Novel Diſſeiſin, is by thoſe aſſiſes appointed to be, a tempore quo dominus rex venit in Angliam proximam poſt pacis factam inter ipſum, & regem filium ſuum.

The ſame king afterwards, in the twenty-fifth year of his reign, divided the limits of his itinerant juſtices into four circuits or diviſions; and to each circuit aſſigned a greater number of juſtices; viz.—five at leaſt, which are thus ſet down in Hoveden, folio 337. viz. (o)

Anno 1179, 25 H. 2. Magno concilio celebrato apud Windeſhores, communi conſilio archiepiſcoporum comitum & baronum & coram rege filio ſuo, rex diviſit Angliam in quatuor partes, & unicuique partium præfecit viros ſapientes ad faciendum juſtitiam in terra ſua in hunc modum.

(o) This important ordinance of Henry, had a direct tendency to reſtrain the oppreſſions of the barons, and to protect the inferior gentry and common people in their property. Hoveden, 590. Theſe juſtices were either prelates or conſiderable nobility; and beſides carrying the authority of the king's commiſſion, were able, by the dignity of their own characters, to give weight and credit to the laws.

1. Ricardus epiſcopus Winton, Ricardus theſaurarius regis, Nicholaus filius Turoldi, Thomas Baſſet & Robertus de Whitefield, for the counties of Southampton, Wilts, Glouceſter, Somerſet, Devon, Cornwall, Berks and Oxon,

2. Galfridus Elienſis epiſcopus, Nicholaus capellanus regis, Gilbertus Pipard, Reginald de Wiſebeck capellanus regis & Gaulfridus Hoſce, for the counties of Cambridge, Huntingdon, Northampton, Leiceſter, Warwick, Wincheſter, Hereford, Stafford and Salop.

3. Johannes epiſcopus Norwicenſis, Hugo Murdac clericus regis, Michael Bellet, Richardus de le Pec, & Radulphus Brito, for Norfolk, Suffolk, Eſſex Hartford, Middleſex, Kent, Surrey, Suſſex, Bucks and Bedford.

4. Galfredus de Luci, Johannes Comyn, Hugo de Gaerſt, Radulphus de Glanvilla, W. de Bendings, Alanus de Furnellis, for the counties of Nottingham, Derby, York, Northumberland, Weſtmorland, Cumberland, and Lancaſter.

Iſti ſunt juſticiæ in curia regis conſtituti ad audiendum clamores populi.

This prince did theſe three notable things, viz.

Firſt, by this means, he improved and perfected the laws of England, and doubtleſs transferred over many of the Engliſh laws into Normandy, which, as before is obſerved, cauſed that great ſuitableneſs between their laws and ours; ſo that, the ſimilitude did ariſe, much more by a CONFORMATION of their laws, to thoſe of England, than by any conformation of the Engliſh laws to theirs; eſpecially in the reigns of king Henry II. and his two ſons, king Richard, and king John, both of whom were alſo dukes of Normandy.

Secondly, he checked the pride and inſolence of the pope and the clergy, by thoſe conſtitutions made in a parliament at Clarendon; whereby he reſtrained the exorbitant power of the eccleſiaſticks, and the exemption they claimed from ſecular juriſdiction. And,

Thirdly, he ſubdued and conquered Ireland, and added it to the crown of England; which conqueſt was begun by Richard earl of Stigule, or, Strongbow, 14 H. 2. But

was perfected by the king himſelf in the ſeventeenth year of his reign; and, for the greater ſolemnity of the buſineſs, was ratified by the FEALTIES of the biſhops and nobles of Ireland, and by a bull of confirmation from pope Alexander; who was willing to intereſt himſelf in that buſineſs, to ingratiate himſelf with the king, and to gain a pretence for that ARROGANT USURPATION of diſpoſing of temporal dominions. Vide Hoveden, anno 14 H. 2. and the ninth chapter of this hiſtory (*p*).

Richard I. eldeſt ſon of king Henry II. ſucceeded his father. I have ſeen little of record, touching the juridical proceedings, either of him, or his ſaid father, other than what occurs in the PIPE-ROLLS in the exchequer; which both in the time of Henry II. Richard I. and king John, and all the ſucceeding kings, are fairly preſerved; and the beſt remembrances that we have of this king's reign in relation to the law, are what Roger Hoveden's Annals have delivered down to us, viz.

Firſt, he inſtituted a body of naval laws in his return from the Holy Land, in the iſland of Oleron, which are yet extant, with ſome additions; de quibus, vide Mr. Selden's Mare Clauſum, lib. 2. cap. 24. and I ſuppoſe they are the ſame which are attributed to him by Matt. Paris, anno 1196. and he conſtituted juſtices to put them in execution (*q*).

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(*p*) To the "three notable things," which ſir Matthew Hale has thought proper to notice, it may not be improper to add, that Henry introduced and eſtabliſhed the grand aſſize, or trial by a ſpecial kind of jury, in a writ of right, at the option of the tenant or defendant, inſtead of the barbarous and Norman trial by battle. Blac. Com. 4 v. 422. All advances towards reaſon and good ſenſe are ſlow and gradual.—Henry, though ſenſible of the great abſurdity attending the trial by duel or battle, did not venture to aboliſh it: he only admitted either of the parties to challenge a trial by an aſſize or a jury of twelve freeholders. Glanv. lib. 2. cap. 7.—To the reign of Henry II. muſt alſo be referred the introduction of eſcuage, or pecuniary commutation for perſonal military ſervice, which in proceſs of time was the parent of the ancient ſubſidies granted to the crown by parliament, and the land tax of later times. Blac. Com. 4 v. 423. See Madox, 435, 436, 437, 438. Tyrrel, vol. 2. 466. from the records. Hume, 1 v. oct. 500, 501.

(*q*) The laws of Oleron concerning naval affairs, are the only ſpecimen of the legiſlative capacity of this brave and magnanimous

Secondly, he obſerved the ſame method of diſtributing juſtice as his father had begun, by juſtices itinerant per ſingulos Angliæ comitatus; to whom he delivered two kinds of extracts or articles of inquiry, viz. capitula coronæ, much reformed and augmented from what they were before, and capitula de Judæis; the whole may be read in Hoveden, fo. 423. ſub anno 5 R. 1. and by thoſe articles it appears, that at that time there was a ſettled court for the common pleas, as well as for the king's bench; though it ſeems that pleas of LAND were then INDIFFERENTLY held in either; as appears by the firſt and ſecond articles thereof, where we have,—"Placita per breve domini regis, "vel per breve capitalis juſticiæ, vel a capitali curia regis "coram eis (juſticiis) miſſa:" the former whereof ſeems to be the common pleas, which held pleas by original writ, which writ was under the king's teſte when he was in England; but when he was beyond the ſeas, it was under the teſte of the juſticiarius Angliæ, as the cuſtos regni in the king's abſence (*r*).

The power which the juſtices itinerant had to hold pleas in writs of right, or the grand aſſize, was ſometimes limited; as here by the articuli coronæ under Henry II.—to half a knight's fee, or under: for here in theſe articles it is, "de "magnis aſſiſis quæ ſunt de centum ſolidis & infra." But in the next commiſſions, inſtructions, or capitula coronæ, it is, "De magnis aſſiſis uſque ad decem libratas terre & "infra."

In his eighth year, he eſtabliſhed a common rule for weights and meaſures throughout England, called aſſiſa de menſuris; wherein we find the meaſure of woollen cloths was then the ſame with that of magna charta, 9 H. 3. viz. "de duobus ulnis infra liſuras (*s*)."

In

mous prince. They were made at the iſle of Oleron, off the coaſt of France, where his fleet rendezvouſed in their paſſage to the Holy Land. Theſe laws were deſigned for the keeping of order, and for the determination of controverſies abroad; and they were framed with ſuch wiſdom, that they have been adopted by other nations as well as England. "I think (ſays Dr. Sullivan) to this time we may, with probability enough, refer the origin of the admiralty juriſdiction."—Sulliv. Lect. 331. See Blac. Com. 4 v. 423.

(*r*) Vide, note [B.] on this chapter.

(*s*) He eſtabliſhed by law one weight and meaſure throughout his king-

In the year before his death, the like juſtices errant went through many counties of England, to whom articles, or capitula placitorum coronæ, not much unlike the former, were delivered. Vide Hoveden, ſub anno 1198. fo. 445.

And in the ſame year, he iſſued commiſſions in the Trent, Hugh de Neville being chief juſtice; and to thoſe were alſo delivered articles of inquiry, commonly called aſſiſæ de foreſta, which may be read at large in Hoveden, ſub eodem anno. Theſe gave great diſcontent to the kingdom, for both the laws of the foreſt, and their execution were rigorous and grievous. (t)

King John ſucceeded his ſaid brother, both in the kingdom of England, and dutchy of Normandy; the evidence that we have, touching the progreſs of the laws of his time, are principally three, viz. firſt, his charters of liberties. Secondly, the records of pleadings and proceedings in his courts; and thirdly, the courſe he took for ſettling the Engliſh laws in Ireland.

1. Touching the firſt of theſe, his charters of the liberties of England, and of the foreſt, were hardly, and with difficulty, gained by his baronage at Stanes, anno Dom. 1215. The collection of the former was, as Mat. Paris tells us, upon the view of the charter or law of king Henry I. which he ſays, contained quaſdam libertates & leges a rege Edvardo Sancto, eccleſiæ & magnatibus conceſſas, exceptis quibuſdam libertatibus quas idem rex de ſuo adjecit; and that thereupon the baronage fell into a reſolution to have thoſe laws granted by king John. But as it is certain, that

kingdom. Mat. Paris, 109, 134. Trivet, 127. Ann. Waverl. 165. Hoved. 774. An uſeful inſtitution, which the mercenary diſpoſition and neceſſities of his ſucceſſor engaged him to diſpenſe with for money.

(t) Mr. Juſt. Blackſtone, ſpeaking of Richard I. ſays he was "a ſportſman as well as a ſoldier, and therefore enforced the foreſt laws with ſome rigour, which occaſioned many diſcontents among his people: though (according to Matthew Paris) he REPEALED the penalties of caſtration, loſs of eyes, and cutting off the hands and feet, before inflicted on ſuch as tranſgreſſed in hunting; probably finding that their ſeverity prevented proſecutions."—Blac. Com. 4 v. 423.—Mr. Hume ſays that Richard RENEWED the ſevere laws againſt tranſgreſſors in his foreſts, whom he puniſhed by caſtration, and putting out their eyes, as in the reign of his great-grandfather. Hiſt. Eng. 2 v. oct. 38.

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the laws added by king Henry I. to thoſe of the confeſſor, were many more, and much differing from his; ſo the laws contained in the great charter of king John, differed much from thoſe of king Henry I. neither are we to think, that the charter of king John contained ALL the laws of England; but only, or principally, ſuch as were of A MORE COMPREHENSIVE NATURE; and concerned the common rights and liberties of the church, baronage and commonalty; which were of the greateſt moment, and had been moſt invaded by king John's father and brother. [C]

The leſſer charter, or de foreſta, was to reform the exceſſes and encroachments which had been made, eſpecially in the time of Richard I. and Henry II.—who had made new afforeſtations, and much extended the rigour of the foreſt laws: and both theſe charters, do in ſubſtance agree with that magna charta et de foreſta, granted and confirmed 9 Hen III. I ſhall not need to recite them, or to make any collections or inferences from them; they are both extant in the red book of the exchequer, and in Mat. Paris, ſub anno 1215, and the record and the hiſtorian do verbatim agree.

As to the ſecond evidence we have of the progreſs of the laws in king John's time; they are the records of pleadings and proceedings, which are ſtill extant: but although this king endeavoured to bring the law, and the pleadings and proceedings thereof, to ſome better order than he found it; —(for ſaving his profits, whereof he was very ſtudious, and for the better reduction of it into order and method, we find frequently in the records of his time, fines impoſed, pro ſtultiloquio; which were no other than mulcts, impoſed by the court for barbarous and diſorderly pleading: from whence afterwards that common fine aroſe, pro pulchre placitando, which was indeed no other than a fine for want of it;—)and yet, for all this, the proceeding in his courts were rude, imperfect, and defective, to what they were in the enſuing times of Edward I. &c. But ſome few obſervables I ſhall take notice of upon the peruſal of the judicial records of the time of king John, viz.

Firſt, that the courts of king's bench and common pleas were THEN DISTINCT COURTS, and diſtinctly held from the beginning, to the end, of king John's reign (*u*).

Secondly, that as yet, neither one, nor both, of thoſe courts, diſpatched the buſineſs of the kingdom; but a great part thereof was diſpatched by the juſtices itinerant, which were ſometimes in uſe, but not without their intermiſſions; and much of the publick buſineſs was diſpatched in the county courts, and in other inferior courts; and ſo it continued, though with a gradual decreaſe, till the end of king Edward I. and for ſome time after: and hence it was, that in thoſe elder times, the profits of thoſe county courts, for which the ſheriff anſwered in his farm, de proficuis comitatus; alſo fines were levied there, and poſt fines, and fines pro licentia concordandi, and great fines there anſwered; fines pro inquiſitionibus habendi, fines for miſdemeanors, though called amerciaments, — aroſe to great ſums, as will appear to any who ſhall peruſe the ancient viſcontiels.

But, as I ſaid before, the buſineſs of inferior courts grew gradually leſs and leſs, and conſequently their profits and buſineſs of any moment, came to the great courts; where they were diſpatched with greater juſtice and equality. Beſides, the greater courts obſerving what partiality and brocage was uſed in the inferior courts, gave a pretty quick ear to writs of falſe judgment; which was the appeal the law allowed from erroneous judgments in the county courts (*x*); and this, by degrees, waſted the credit and buſineſs of thoſe inferior courts.

Thirdly, that the diſtinction between the king's bench and common bench, as to the point of communia placita, was not YET, nor for ſome time after, ſettled; and hence it is, that frequently in the time of king John, we ſhall find that common pleas were held in B. R.—yea, in Mich. & Hill. 13 Johannis, a fine was levied coram ipſo rege, between Gilbert Fitz Roger and Helwiſe his wife, plaintiffs,

(*u*) Vide note [B] on this chapter.

(*x*) A writ of falſe judgment lies whenever a falſe judgment is given, in an inferior court, NOT of record. F. N. B. 17. Moor. 73.

and

and Robert Barpyard, tenant of certain lands in Kirby, &c (*y*).

And again; whereas there was frequently a liberty granted anciently by the kings of England, and allowed, quod non implacitetur niſi coram rege, I find inter placita de diverſis terminis ſecundo Johannis, that upon a ſuit between Henry de Rochala, and the abbot of Leiceſter, before the juſtices de banco, the abbot pleaded the charter of king Richard I. quod idem abbas pro nullo reſpondeat niſi coram ipſo rege vel capitali juſtitiario ſuo;—and it is ruled againſt the abbot; quia omnia placita quæ coram juſtic. de banco tenentur, coram domino regi vel ejus capitali juſtitiario teneri intelliguntur. But this point was afterwards ſettled by the ſtatute of magna charta (*z*), quod communia placita non ſequantur curiam noſtram.

Fourthly, that the four terms were then held according as was uſed in after-times, with little variance, and had the ſame denominations they ſtill retain.

Fifthly, that there were oftentimes conſiderable ſums of money, or horſes, or other things, given to obtain juſtice; ſometimes it is ſaid to be, pro habenda inquiſitione ut ſupra; and inter placita incerti temporis regis Johannis, the men of Yarmouth againſt the men of Haſtings and Winchelſea, afferunt domino regi tres palfridos, & ſex aſturias narenſes ad inquiſitionem habendam per legales, &c. and frequently the ſame was done, and often accounted for in the pipe-rolls, under the name of OBLATA; and to remedy this abuſe, was the proviſion made in king John's and king Henry III.'s charters, nulli vendemus juſtitiam vel rectum (*a*). But yet fines upon originals being certain, have continued to this day, notwithſtanding that proviſion; but thoſe enormous oblata before mentioned, are thereby remedied and taken away [D].

Sixthly, that in all the time of king John, the purgation per ignem & aquam, or the trial by ORDEAL, continued; as appears by frequent entries upon the rolls (*b*);

(*y*) See note [B] on this chapter, and Barr. Obſ. on ſtat. 10, 11. and Sulliv. Lect. 312. ſeq.

(*z*) Cap. 11. See the authorities referred to in the laſt note.

(*a*) Vide Barring. on ſtat. 22. and the authorities there cited. See alſo mag. car. cap. 29.

(*b*) See Barring. on ſtat. 296. and Blac. Com. 4 v. 425.

but it ſeems to have ended with this king, for I do not find it in uſe in any time after; perchance the barbarouſneſs of the trial, and perſuaſions of the clergy, prevailed at length to antiquate it, for many canons had been made againſt it [E]

Seventhly, in this king's time, the deſcent of ſocage, as well as knight's ſervice lands, to the ELDEST ſon, prevailed in all places (*c*); unleſs there was a ſpecial cuſtom, that the lands were partible inter maſculos; and therefore, Mich. ſecundo Johannis, in a rationabili parte bonorum, by Gilbert Beville againſt William Beville his elder brother, for lands in Gunthorpe, the defendant pleaded, quod nunquam partita vel partibilia fuere; and becauſe the defendant could not prove it, judgment was given for the demandant: and by degrees it prevailed ſo, that whereas at this time the averment came on the part of the heir at law, that the land nunquam partita vel partibilis extetit; in a little time after the averment was turned on the other hand, viz. that though the land was ſocage, yet unleſs he did aver and prove that it was PARTITA ET PARTIBILIS, he failed in his demand.

Thirdly, the third inſtance of the progreſs of king John's reign, in relation to the common law, was his ſettling the ſame in Ireland, which he made his more immediate and particular buſineſs: but hereof we ſhall add a particular chapter by itſelf, (*d*) when we have ſhewn you what proceedings and progreſs was made therein in the time of Edward I. The many and great troubles that fell upon king John and the whole kingdom, eſpecially towards the latter end of his reign, did much hinder the good effect of ſettling the laws of England, and conſequently the peace thereof, which might have been bottomed, eſpecially upon the great charter. But this unfortunate prince and the kingdom, were ſo entangled with inteſtine wars, and with the invaſion of the French, who aſſiſted the Engliſh barons againſt their king; and by the advantages and uſurpations that the pope and the clergy made by thoſe diſtempers, that all ended in a confuſion with the king's death. (*e*)

I come

(*c*) Vide poſt. cap. 11. paſſim.
(*d*) Vide poſt. cap. 9.
(*e*) It ſhould not be forgotten, that the firſt traces which remain of

I come therefore to the long and troubleſome reign of Henry III. who was about nine years old at his father's death; he being born in feſto ſancti remigii 1207 (*f*), and king John died in feſto ſancti lucæ, 1216, and the young king was crowned the 28th of October, (*g*) being then in the tenth year of his age, and was under the tutelage of William earl-marſhal. (*h*)

The nobility were quick and earneſt, notwithſtanding his minority, to have the liberties and laws of the kingdom confirmed; and preparatory thereto, in the year 1223, writs iſſued to the ſeveral counties to enquire, by twelve good and lawful knights, que fuerunt libertates in Anglia tempore regni Henrici avi ſui, returnable quindena Paſchæ. What ſucceſs thoſe inquiſitions had, or what returns were made thereof, appears not: but in the year following, the young king ſtanding in need of a ſupply of money from the clergy and laity, none would be granted, unleſs the liberties of the kingdom were confirmed, as they were expreſſed and contained in the two charters of king John; which the king accordingly granted in his parliament at Weſtminſter, and they were accordingly proclaimed, ita quod chartæ utrorumque regum in nulla inveniatur diſſimiles. Mat. Paris. Anno 1224.

In the year 1227, the king holding his parliament at Oxford, and being now of full age, by ill advice, cauſes the two charters he had formerly granted to be cancelled; hanc occaſionem prætendens, quod chartæ illæ conceſſæ fuerunt & libertates ſcriptæ & ſignatæ dum ipſe erat ſub cuſtodia, nec ſui corporis aut ſigilli aliquam poteſtatem habuit, unde viribus carere debuit, &c. Which fact occaſi-

of the ſeparation of the greater barons from the leſs, in the conſtitution of parliaments, are found in the great charter of king John, though omitted in that of Henry III.

(*f*) Henry III. was born on the firſt of October 1207.

(*g*) He was crowned on the 28th of October 1216. M. Paris, 200. Hiſt. Croyſ. Cont. 474. W. Heming. 562. Trivet, 168.

(*h*) The earl of Pembroke;—who, at the time of John's death, was mariſchal of England; by his office he was at the head of the armies, and conſequently, during a ſtate of civil wars and convulſions, at the head of the ſtate; it happened fortunately for the young monarch, and for the nation, that the power could not have been intruſted into more able and more faithful hands. Hume.

oned a great diſturbance in the kingdom: and this inconſtancy in the king, was in truth THE FOUNDATION OF ALL HIS FUTURE TROUBLES, and yet was ineffectual to his end and purpoſe; for thoſe charters were NOT avoidable for the king's nonage; and if there could have been any ſuch pretence, that alone would NOT avoid them; for they were laws CONFIRMED IN PARLIAMENT.

But the great charter, and the charter of the foreſt, did not expire ſo; for, in 1253, they were again ſealed and publiſhed: and becauſe, after the battle of Eveſham, the king had wholly ſubdued the barons, and thereby a jealouſy might grow, that he again meant to infringe it; in the parliament at Marlbridge, [cap 5.] they were again confirmed. And thus we have the great ſettlement of the laws and liberties of the kingdom eſtabliſhed in this king's time: the charters themſelves are not every word the ſame with thoſe of king John, but they differ very little in ſubſtance.

This great charter, and charta de foreſta, was the great baſis upon which this ſettlement of the Engliſh laws ſtood in the time of this king and his ſon; there were alſo ſome additional laws of this king yet extant, which much poliſhed the common law, viz. the ſtatutes of Merton and Marlbridge, and ſome others.

We have likewiſe two other PRINCIPAL MONUMENTS, of the great advance and perfection that the Engliſh laws attained to, under this king, viz. the tractate of Bracton, and thoſe records of pleas, as well in both benches, as before the juſtices itinerant, the records whereof are ſtill extant.

Touching the former, viz. Bracton's tractate, it yields us a great evidence of the growth of the laws between the times of Henry II. and Henry III. If we do but compare Glanville's book with that of Bracton, we ſhall ſee A VERY GREAT ADVANCE OF THE LAW in the writings of the latter, over what they are in Glanville. It will be needleſs to inſtance particulars; ſome of the writs and proceſſes do indeed in ſubſtance agree, but the proceedings are much more regular and ſettled, as they are in Bracton, above what they are in Glanville. The book itſelf in the beginning ſeems to borrow its method from the civil law; but the greateſt part of the ſubſtance, is either of the courſe of proceedings in the law, known to the author; or of reſolutions and deciſi-

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ons in the courts of king's-bench and common-bench, and before juſtices itinerant; for now the inferior courts began to be of little uſe or eſteem. (*i*)

As to the judicial records of the time of this king, they were grown to a much greater degree of perfection, and the pleadings more orderly, many of which are extant: but the great troubles, and the civil wars, that happened in his time, gave a great interruption to the legal proceedings of courts; they had a particular commiſſion and judicatory for matters happening in time of war, ſtiled, placita de tempore turbationis, wherein are many excellent things: they were made principally about the battle of Eveſham, and after it; and for ſettling of the differences of this kingdom, was the *dictum*, or *edictum de Kenelworth* (*k*) made, which is printed in the old magna charta.

We have little extant of reſolutions in this king's time, but what are either remembered by Bracton, or ſome few broken and ſcattered reports collected by Fitzherbert in his abridgment. There are alſo ſome few ſums, or conſtitutions, relative to the law; which though poſſibly NOT acts of parliament, yet have obtained in uſe as ſuch; as de diſtrictione ſcaccarii, ſtatutum panis & cereviſiæ, dies communes in banco, ſtatutum Hiberniæ, ſtat. de ſcaccario, judicium colliſtrigii, and others. [Vide Barring. on ſtat. 39. 46. ſeq.]

We come now to the time of Edward I. who is well ſtiled our ENGLISH JUSTINIAN; for in his time the law, quaſi per ſaltum, obtained a very great perfection. The pleadings are SHORT indeed, but excellently good and PERSPICUOUS: and although for ſome time, ſome of thoſe imperfections and ancient inconvenient rules obtained: as for inſtance, in point of deſcents; where the MIDDLE brother held of the eldeſt, and dying without iſſue, the lands deſcended to the YOUNGEST; upon that old rule in the time of Henry II. Nemo poteſt eſſe dominus & hæres, mentioned in Glanville; at leaſt if he had once received homage. 13 E. 1. Fitz Avowry 235. Yet, the laws did never, in

(*i*) It is worthy of remembrance that towards the end of the reign of this monarch, we find the firſt record of any writ for ſummoning knights, citizens and burgeſſes to parliament. Vide ante, chapter the firſt.

(*k*) Vide cap. 1. note (*y*).

any one age, receive ſo great and ſudden an advancement; nay, I think I may ſafely ſay, all the ages ſince his time have NOT done ſo much in reference to the orderly ſettling and eſtabliſhing of the diſtributive juſtice of this kingdom, as he did within a ſhort compaſs of the thirty-five years of his reign; eſpecially about the firſt thirteen years thereof. (*l*)

Indeed, many penal ſtatutes and proviſions, in relation to the peace and good government of the kingdom, have been ſince made. But as touching the common adminiſtration of juſtice between party and party, and accommodating of the rules, and of the methods and orders of proceeding, HE DID THE MOST, at leaſt of any king, ſince William I.—and left the ſame, as a fixed and ſtable rule and order of proceeding, very little differing from that which we now hold and practice, eſpecially as to the ſubſtance and principal contexture thereof.

It would be the buſineſs of a volume, to ſet down all the particulars, and therefore I ſhall only give ſome ſhort obſervations touching the ſame. (*m*)

Firſt, he perfectly ſettled the great charter, and charta de foreſta; not only by a practice conſonant to them, in the diſtribution of law and right;—but alſo, by that ſolemn act, paſſed 25 E. 1. and ſtiled confirmationes cartarum.

Secondly, he eſtabliſhed and diſtributed the ſeveral juriſdictions of courts within their proper bounds. And becauſe this head has ſeveral branches, I ſhall ſubdivide the ſame, viz.

1. He checked the incroachments and inſolencies of the pope and the clergy, by the ſtatute of Carliſle.

2. He declared the limits and bounds of the eccleſiaſtical juriſdiction, by the ſtatute of circumſpecte agatis & articuli cleri. For note, though this latter ſtatute was not publiſhed till Edward II. yet it was COMPILED in the beginning of Edward I.

(*l*) Vide Blac. Com. 4 v. 425.

(*m*) Mr. Juſt. Blackſtone has concifely, but elegantly and ſufficiently, enumerated the principal part of theſe regulations, in the fourth volume of his commentaries, from page 425 to 427. oct.

3. He

3. He eſtabliſhed the limits of the court of common pleas; perfectly performing the direction of magna charta, —quod communia placita NON SEQUANTUR curia noſtra, in relation to B. R.—and in expreſs terms extending it to the court of exchequer, by the ſtatute of articuli ſuper chartas, cap. 4. It is true, upon my firſt reading of the placita de banco of Edward I. I found very many appeals of death, of rape, and of robbery therein; and therefore I doubted, whether the ſame were not held, at leaſt by writ, in the common pleas court: but, upon better inquiry, I found many of the records before juſtices itinerant were entered, or filled up, among the records of the common pleas; which might occaſion that miſtake.

4. He eſtabliſhed the extent of the juriſdiction of the ſteward and marſhal. Vide articuli ſuper chartas, cap. 3. And,

5. He alſo ſettled the bounds of inferior courts; not only of counties, hundreds, and courts baron, which he kept within their proper and narrow bounds, for the reaſons given before; and ſo gradually the common juſtice of the kingdom came to be adminiſtred by men knowing in the laws, and converſant in the great courts of B. R. and C. B. and before juſtices itinerant; but alſo, by that excellent ſtatute of Weſtminſter 1. cap. 35. he kept the courts of great men within their limits, under ſeveral penalties; wherein ordinarily, very great incroachments and oppreſſions were exerciſed.

The third general obſervation I make is, he did not only explain, but excellently enforced, magna charta, by the ſtatute de tallagio non concedendo, 34 E. 1.

Fourthly, he provided againſt the interruption of the common juſtice of the kingdom, which had too commonly been affected, by mandates under the great ſeal, or privy ſeal; this he did by the ſtatute of articuli ſuper chartas, cap. 6.—which interruptions, notwithſtanding magna charta, had formerly been frequent in uſe *(n)*.

Fifth-

(*n*) Edward enacted a law to this purpoſe, but it is very doubtful, whether he ever obſerved it. We are ſure that ſcarce any of his ſucceſſors did. The multitude of theſe letters of protection were a ground

Fifthly, he ſettled the forms, ſolemnities, and efficacies of fines; confining them to the common-pleas, and to juſtices itinerant; and appointed the place, where they brought the records after their circuits; whereby one common repoſitory might be kept of aſſurances of lands; which he did by the ſtatute de modo levandi fines, 18 E. 1.

Sixthly, he ſettled that great and orderly method, for the ſafety and preſervation of the peace of the kingdom, and ſuppreſſing of robberies; by the ſtatute of Winton.

Seventhly, he ſettled the method of tenures, to prevent multiplicity of penalties, which grew to a great inconvenience; and remedied it by the ſtatute of quia emptores terrarum, 18 E. 1.

Eighthly, he ſettled a ſpeedier way for recovery of debts, not only for merchants and tradeſmen, by the ſtatutes of Acton, Burnel, & de mercatoribus; but alſo for other perſons, by granting an execution for a moiety of the lands by elegit.

Ninthly, he made effectual proviſion for recovery of advowſons and preſentations to churches; which was before infinitely lame and defective; by ſtatute Weſtminſter 2. cap. 1.

Tenthly, he made that GREAT ALTERATION in eſtates, from what they were formerly; by ſtatute Weſtminſter 2. cap. 1. whereby eſtates of fee-ſimple, CONDITIONAL AT COMMON LAW, were turned into ESTATES-TAIL, not removable from the iſſue, by the ordinary methods of alienation (*o*); and upon this ſtatute, and for the qualifications here-

ground of complaint by the commons in 3 Edw. II. See Ryley, 525. This practice is declared illegal by the ſtatute of Northampton, paſſed in the reign of Edward III. but ſtill continued, like many other abuſes. There are inſtances of it ſo late as the reign of Elizabeth.

(*o*) By this ſtatute Edward ESTABLISHED a new limitation of property, concerning the good policy of which, modern times have, however, entertained a very different opinion. Blac. Com. 4 v. 427. and ſee Barring. on ſtat. 112. The chief obſtruction to the execution of juſtice in thoſe times was the power of the great barons; and Edward was perfectly qualified, by his character and abilities, to keep thoſe tyrants in awe, and to reſtrain their illegal practices. This ſalutary purpoſe was accordingly the great object of his attention; yet he was imprudently led into a meaſure which tended very much to encreaſe and confirm their ex-

hereof, are the ſuperſtructures built of 4 Henry VII. cap. 32. 32 Henry VIII. and 33 Henry VIII.

Eleventhly, he introduced quite a new method, both in the laws of Wales, and in the method of their diſpenſation, by the ſtatute of Rutland. Vide poſt. cap. 9.

Twelfthly, in brief, partly by the learning and experience of his judges, and partly by his own wiſe interpoſition, he ſilently and without noiſe, abrogated many ill and inconvenient uſages, both in his courts of juſtice, and in the country. He rectified and ſet in order, the method of collecting his revenue in the exchequer, and removed obſolete and illeviable parts thereof out of charge; and by the ſtatutes of Weſtminſter 1. and Weſtminſter 2. Glouceſter and Weſtminſter 3. and of articuli ſuper chartas, he did remove ALMOST ALL that was either grievous, or impractical, out of the law, and the courſe of its adminiſtration; and ſubſtituted ſuch apt, ſhort, pithy and effectual remedies and proviſions, as by the length of time, and the experience had of their convenience, have ſtood ever ſince without any great alteration; and are now as it were incorporated into, and become a part of the common law itſelf.

Upon the whole matter, it appears, that the very ſcheme, mould and model of the common law, eſpecially in relation to the adminiſtration of common juſtice between party

exorbitant authority. He paſſed the ſtatute of Weſtminſter, which, by allowing them to entail their eſtates, made it impracticable to diminiſh the property of the great families, and of conſequence left them every mean of encreaſe and acquiſition. Brady of Boroughs, 25. from the records. — Hume's Hiſt. Eng. 2 v. oct. 333.

By the words of the ſtatute de donis, a perpetuity was created, and the donee was reſtrained either from alienation or forfeiture. In a ſhort time it was manifeſt that this reſtriction was not only inconſiſtent with the reaſons of the common law, but repugnant to every idea of ſound policy. The great, however, were unwilling to make any parliamentary alteration in the law, and therefore the judges, in the time of Edward IV. encouraged the fineſſe of a COMMON RECOVERY, in order to bar the entail; the judges conceiving the caſe of a common recovery not to be within the operation of the ſtatute. Another wound given to theſe perpetuities was, by the ſtatute 4 H. VII. cap. 24. which made a fine with proclamations a bar to the iſſue in tail, and ſo repealed that clauſe of the ſtatute de donis, quod finis ipſo jure ſit nullus.

and

and party, as it was highly rectified and ſet in a much better light and order by this king, than his predeceſſors left it to him; ſo in a very great meaſure it has continued the ſame in all ſucceeding ages to this day (p); ſo that the mark, or epocha, we are to take for the true ſtating of the law of England, WHAT IT IS, is to be conſidered, ſtated and eſtimated, from what it was when this king LEFT it. Before his time, it was in a great meaſure, rude and unpoliſhed, in compariſon of what it was after his reduction thereof; and on the other ſide, as it was thus poliſhed and ordered by him, ſo has it ſtood hitherto, without any great or conſiderable alteration; abating ſome few additions and alterations which ſucceeding times have made, which for the moſt part are in the ſubject matter of the laws themſelves, and not ſo much in the rules, methods, or ways of its adminiſtration.

As I before obſerved ſome of thoſe many great acceſſions to the perfection of the law under this king, ſo I ſhall now obſerve, ſome of thoſe boxes or repoſitories where they may be found, which are of the following kinds, viz.

Firſt, the acts of parliament in the time of this king; which are full of excellent wiſdom and perſpicuity, yet brevity; but of this, enough before is ſaid.

Secondly, the judicial records in the time of this king. I ſhall not mention thoſe of the chancery, the cloſe-patent and charter rolls, which yet will very much evidence the learning and judgment of that time; but I ſhall mention the rolls of judicial proceedings, eſpecially thoſe in the king's-bench and common-pleas, and in the eyres. I have read over many of them, and do generally obſerve,

1. That they are written in an excellent hand.

2. That the pleading is VERY SHORT, but VERY CLEAR AND PERSPICUOUS, and neither looſe or uncertain, nor perplexing the matter either with impropriety, obſcurity, or

(p) Vide Blac. Com. 4 v. 427. There cannot be a better proof of the excellence of Edward's conſtitutions, than that from his time to that of Henry VIII. there happened very few, and thoſe not very conſiderable alterations in the legal forms of proceedings.

mul-

multiplicity of words: they are clearly and orderly digeſted, effectually repreſenting the buſineſs that they intend (q).

3. That the title and the reaſon of the law upon which they proceed, (which many times is expreſly delivered upon the record itſelf) is perſpicuous, clear and rational; ſo that their SHORT AND PITHY PLEADINGS AND JUDGMENTS do far better render the ſenſe of the buſineſs, and the reaſons thereof, than thoſe long, intricate, perplexed, and formal pleadings, that oftentimes of late are UNNECESSARILY uſed.

Thirdly, the reports of the terms and years of this king's time, a few broken caſes whereof are in Fitzherbert's abridgment; but we have no ſucceſſive terms or years thereof, but only ancient manuſcripts perchance, not running through the whole time of this king; yet they are VERY GOOD, but VERY BRIEF: either the judges then ſpoke leſs, or the reporters were not ſo ready handed as to take all they ſaid. And hence this brevity makes them the more obſcure. But yet in thoſe brief interlocutions between the judge and the pleaders, and in their definitions, there appears A GREAT DEAL OF LEARNING AND JUDGMENT. Some of theſe reports, though broken, yet the beſt of their kind, are in Lincolns-inn library.

Fourthly, the tracts written or collected in the time of this wiſe and excellent prince; which ſeem to be of two kinds, viz. Such as were only the tractates of private men, and therefore had no greater authority than private collections, yet contain much of the law then in uſe; as Fleta, the Mirror, Britton and Thornton; or elſe, ſecondly, they were ſums or abſtracts of ſome particular parts of the law, as, Novæ narrationes, Hengham magna & parva, Cadit aſſiſa ſumma, De baſtardia ſumma; by all which, compared

(q) "It is worthy of obſervation, (ſays ſir Edward Coke) that in the reigns of Edward the ſecond, Edward the firſt, and upwards, the pleadings were plain and ſenſible, but nothing curious; evermore having chief reſpect to the MATTER, and not to forms of words." 1 Inſt. 304. a. "But even in thoſe days, (continues ſir Edward) the forms of the regiſter of original writs were then punctually obſerved, and matters in law excellently debated and reſolved." Id. ib.

even with Bracton, there appears a growth and a perfecting of the law, into a greater regularity and order.

And thus much ſhall ſerve for the ſeveral periods, or growth, of the common law, until the time of Edward I. incluſively; wherein having been ſomewhat prolix, I ſhall be the briefer in what follows; eſpecially ſeeing that from this time downwards, the books and reports printed, give a full account of the enſuing progreſs of the law.

ADDITIONAL NOTES

TO THE

SEVENTH CHAPTER.

NOTE [A] p. 136.

ABOUT the middle of the twelfth century, the eccleſiaſtics, having renounced all immediate ſubordination to the magiſtrate, openly pretended to an exemption, in criminal accuſations, from a trial before courts of juſtice; and were gradually introducing a like exemption in civil cauſes: in fact, HOLY ORDERS WERE BECOME A FULL PROTECTION FOR ALL ENORMITIES. (*a*)

Henry II. therefore deeming it neceſſary to define with preciſion, the exact boundaries of the civil and eccleſiaſtical juriſdictions, on the 25th of January 1164, ſummoned a general council of the nobility and prelates at Clarendon, to whom he ſubmitted the great and important queſtion.

After great contention between the temporal barons and the biſhops, they at length adjuſted and ſigned, a charter, or code of laws, called the Conſtitutions of Clarendon: ſixteen of its articles related particularly to eccleſiaſtical matters, whereof the ten following were the moſt contradictory to the pretenſions of the clergy and the ſee of Rome.

(*a*) It is not eaſy to fix with preciſion when the eccleſiaſtics firſt began to claim exemption from the civil juriſdiction. It is certain, that during the early and pureſt ages of the church, they pretended to no ſuch immunity. Then the authority of the civil magiſtrate extended to all perſons, and to all cauſes. What was at firſt an act of complaiſance, flowing from veneration for their character, was in proceſs of time improved into exemption. Du Cange, in his Gloſſary, voc. Curia Chriſtianitatis, has collected moſt of the cauſes with reſpect to which the clergy arrogated an excluſive juriſdiction; and refers to the authors, or original papers, which confirm his obſervations. Giannone, in his Civil Hiſtory of Naples, lib. 19. ſect. 3. has ranged theſe under proper heads, and ſcrutinizes the pretenſions of the church with his uſual boldneſs and diſcernment.

Firſt,

Firſt, if any diſpute ſhall ariſe concerning the advowſon and preſentation of churches, between laymen, or between eccleſiaſtics and laymen, or between eccleſiaſtics, let it be determined in the court of our lord the king. (*b*)

Secondly, Eccleſiaſtics arraigned and accuſed of any matter, being ſummoned by the king's juſticiary, ſhall come into *his* court, TO ANSWER THERE, concerning that, which it ſhall appear to the king's court, is cognizable there; and ſhall anſwer in the eccleſiaſtical court, concerning that, which it ſhall appear is cognizable there; ſo that the king's juſticiary ſhall ſend to the court of holy church, to ſee in what manner the cauſe ſhall be tried there: and if an eccleſiaſtic ſhall be convicted, or confeſs the crime, the church ought not any longer to give him protection.

Thirdly, it is *unlawful* for archbiſhops, biſhops, and *any dignified clergymen of the realm*, to go out of the realm without the king's licence; and if they ſhall go, they ſhall, if it ſo pleaſes the king, give ſecurity, that they will not, either in going, ſtaying, or returning, procure any evil, or damage, to the king, or the kingdom. (*c*)

Fourthly, perſons excommunicated ought not to give any ſecurity by way of depoſit, nor take any oath, but only find ſecurity and pledge to ſtand to the judgment of the church, in order to abſolution. (*d*)

Fifthly, no tenant IN CHIEF of the king, nor any of the officers of his houſhold, or of his demeſne, ſhall be excommunicate, nor ſhall the lands of any of them be put under an interdict; unleſs

(*b*) Before the eſtabliſhment of the ſpiritual court in England, rights of advowſon were tried in the county courts, where the preſence of the king's officer and other lay aſſiſtants, prevented partial and unjuſt decitions by the eccleſiaſtical judge. But, after the ſeparation of the eccleſiaſtical and civil juriſdictions by William the conqueror, the clergy endeavoured to draw all cauſes of this nature into the ſpiritual court, which was very prudently reſiſted by the civil power in thoſe days, and the trial thereof reſerved to the king's ſupreme court. Ld. Litt. Hiſt. Henry II. vol. 4, oct. 371.

(*c*) This was enacted to prevent the too frequent and dangerous intercourſe between the pope and Engliſh prelates. Lord Lyttleton agrees with Mr. Selden, that the words in the original conſtitution, *perſonæ regni*, ſhould be tranſlated DIGNIFIED clergymen. Vide titles of honour, 732. It takes in all clergymen who held of him *in chief*, but does not here, as his lordſhip thinks, extend to all parſons, or beneficed clergymen, as the word is commonly tranſlated.

(*d*) The words in the original are, "non debent dare *vadium ad remanens*," which being ſomewhat obſcure, have been differently tranſlated by different authors.

leſs application ſhall firſt have been made, to our lord the king, if he be in the kingdom; or, if he be out of the kingdom, to his juſticiary; that he may do right concerning ſuch perſon; and in ſuch manner, as that what ſhall belong to the king's court ſhall be there determined, and what ſhall belong to the eccleſiaſtical court ſhall be ſent thither, that it may there be determined. (*e*)

Sixthly, concerning appeals, if any ſhall ariſe, they ought to proceed from the archdeacon to the biſhop, and from the biſhop to the archbiſhop. And, if the archbiſhop ſhall fail in doing juſtice, the cauſe ſhall at laſt be brought to our lord the king, that by his precept the diſpute may be determined in the archbiſhop's court; ſo that it ought not to proceed any farther without the conſent of our lord the king (*f*).

Se-

(*e*) One reaſon aſſigned for this by the authors of thoſe times is, that the king ſhould not ignorantly be expoſed to converſe with an excommunicated perſon; to prevent which notice to the king would have been ſufficient; whereas the conſtitution itſelf declares the intention to be, that the king may do right concerning ſuch perſon. And it not only ſecures the perſons of the king's tenants and officers from excommunication, but alſo their lands from an interdict, without application to him. In truth, it was meant as a check upon the power of the ſpiritual court, and, as appears from Eadmer, was coeval with the eſtabliſhment of that court in England. Yet the latter part of it ſhews, that it did not take from thence all power of inflicting the diſcipline of the church on ſcandalous ſinners, becauſe they held of the king, or ſerved him as his officers; but only prevented the exerciſe of that juriſdiction over his tenants and officers, without a reaſonable cauſe, or in caſes not properly cognizable there, but belonging to his courts of civil or criminal juſtice. The only fault of this law ſeems to have been the limitation of it, in making that a privilege of one claſs of the people, which was a right due to all. Ibid. 372.

(*f*) In a letter of the biſhop of London to the pope, concerning the diſpute between the king and Becket, he explains this conſtitution as being no prohibition of appeals to Rome, but only a check on their being carried thither unneceſſarily, and without the leave of the king. His words are, "In appellationibus ex antiqua regni ſui conſuetudine id ſibi vindicat (rex ſcilicet) honoris & oneris, ut ob civilem cauſam nullus clericorum regni ſui ejuſdem regni fines exeat, niſi, an ipſius authoritate et mandato jus ſuum obtinere queat, experiendo cognoſcat. Quod ſi nec ſic obtinuerit, ad excellentiam veſtram, ipſo in nullo reclamante, cum volet quilibet appellabit." Without queſtion, there is not in the words of this conſtitution any direct prohibition of appeals to Rome; it being only declared, that, upon an appeal from the archdeacon, the cauſe ought not to proceed any further than the archbiſhop's court, without the conſent of the king. But in effect this reſtraint would generally have ſtopped the cauſe in

Seventhly, if there ſhall ariſe any diſpute between an eccleſiaſtic and a layman, or between a layman and eccleſiaſtic, *about any tenement*, which the eccleſiaſtic pretends to be held in *frank almoigne*, and the layman pretends to be a *lay fee*, it ſhall be determined before the king's chief juſtice, *by the trial of twelve lawful men*, whether the tenement belongs to frank almoigne, or is a lay fee; and if it be found to be frank almoigne, then it ſhall be pleaded in the eccleſiaſtical court; but if a lay fee, then in the king's court; unleſs both parties ſhall claim to hold of the ſame biſhop or baron: but if both ſhall claim to hold the ſaid fee under the ſame biſhop, or baron, the plea ſhall be in *his* court: provided that by reaſon of ſuch trial the party who was firſt ſeized ſhall not loſe his ſeizin, till it ſhall have been finally determined by the plea.

Eighthly, whoſoever is of any city, or caſtle, or borough, or demeſne manor, *of our lord the king*, if he ſhall be cited by the archdeacon or biſhop for any offence, and ſhall refuſe to anſwer to ſuch citation, it is allowable to put him under an interdict; but he ought not to be excommunicated, before the king's chief officer of the town be applied to, that he may by due courſe of law compel him to anſwer accordingly; and if the king's officer ſhall fail therein, ſuch officer ſhall be at the mercy of our lord the king; and then the biſhop may compel the perſon accuſed by eccleſiaſtical juſtice.

Ninthly, pleas of debt whether they be due by faith ſolemnly pledged, or without faith ſo pledged, belong to the king's judicature. (*g*)

Tenthly, when an archbiſhoprick, or biſhoprick, or abbey, or priory, *of royal foundation*, ſhall be vacant, it ought to be in the hands of our lord the king, and he ſhall receive all the rents and iſſues thereof, as of his demeſne; and when that church is to

in that court, and it manifeſtly aſſerted the royal ſupremacy, by ſubjecting the power of appealing to Rome, in eccleſiaſtical cauſes, to the will and pleaſure of the king: whereas the pope claimed the right of receiving ſuch appeals, as inherent in his ſee. Henry's deſire of gaining the conſent of the biſhops to this conſtitution was the reaſon of his avoiding an expreſs prohibition; but he intended it ſhould have the ſame operation, and the pope ſaw that intent. Ibid. 373.

(*g*) The clergy of England being firſt in the reign of king Stephen to extend their juriſdiction in the ſpiritual courts to the trial of perſons for breach of faith, prolæſione fidei, in civil contracts; by which means they drew thither a vaſt number of cauſes which belonged to the civil courts, and of which they had no proper cognizance. To this encroachment they were inſtigated by the biſhops of Rome, and therefore Alexander condemned the above recited ſtatute, which was made to prevent it.

be

be ſupplied, our lord the king ought to ſend for the principal clergy of that church, and the election ought to be made in the king's chapel, with the aſſent of our lord the king, and the advice of ſuch of the prelates of the kingdom as he ſhall call for that purpoſe; and the perſon elect ſhall there do homage and fealty to our lord the king, as his liege lord, of life, limb, and worldly honor, (ſaving his order) before he be conſecrated. (*b*)

The king, thinking that he had now finally prevailed in this great enterprize, ſent the conſtitutions to pope Alexander, requiring his ratification; but Alexander, who plainly ſaw, that they were calculated to eſtabliſh the *independency* of England, abſolutely condemned, in the ſtrongeſt terms, the ten articles above recited, and only ratified the following ſix, viz.

1. Churches belonging to the fee of our lord the king cannot be given away in perpetuity, without the conſent and grant of the king.

2. Laymen ought not to be accuſed unleſs by certain and legal accuſers and witneſſes, in the preſence of the biſhop, ſo as that the archdeacon may not loſe his right, nor any thing which ſhould thereby accrue to him: and if the offending perſons be

(*b*) The ſaving clauſe at the end certainly opened a wide door to elude all the obligations contracted by the prelates in the act of homage and oath of fealty; though it is affirmed by Becket, in a letter to the pope, that "the ſame form was then uſed by the whole Chriſtian church." He likewiſe adds, that when his holineſs abſolved him from an oath, which he had taken at Clarendon, that pontiff told him, that "not even for the preſervation of his life ſhould a biſhop lay himſelf under any obligation without a SAVING to his order, and to the honour of God:" to which he adhered moſt pertinaciouſly. As for the form of election, which is laid down in this ſtatute, it muſt be obſerved, that the making it, in the king's chapel, by the principal clergy of the vacant church, with the advice only of ſuch of the prelates of the kingdom as he ſhould call for that purpoſe, ſeems to have been a practice of no very ancient date; not older than the reign of Henry I. or William Rufus. For Mr. Tyrrel, in the introduction to his hiſtory of England, has proved by many authorities, (ſee Chron. Sax. edit. Oxon. p. 174.) that, during the times of the Saxons, the Engliſh prelates had been uſually elected in the witenagemote, or great council, with the advice or concurrence of the whole aſſembly. It likewiſe appears from the Saxon Chronicle, that the ſame form was continued under William I. But whatever form had been kept up in thoſe or was continued in theſe times, it ſhould ſeem that the chief power in theſe elections was by the conſtitution of the kingdom aſſigned to the king. Id. 375.

ſuch as that none will or dare accuſe them, the ſheriff, being thereto required by the biſhop, ſhall ſwear twelve lawful men of the vicinage, or town, before the biſhop, to declare the truth, according to their conſcience.

3. Archbiſhops, biſhops, and all dignified clergymen who hold of the king in chief, have their poſſeſſions from the king *as a barony*, and anſwer thereupon to the king's juſtices and officers, and follow and perform all royal cuſtoms and rights, and, like other barons, ought to be preſent at the trials of the king's court with the barons, till the judgment proceeds to loſs of members or death.

4. If any nobleman of the realm ſhall forcibly reſiſt the archbiſhop, biſhop, or arch-deacon, in doing juſtice upon him or his, the king ought to bring them to juſtice; and if any ſhall forcibly reſiſt the king in his judicature, the archbiſhops, biſhops, and archdeacons, ought to bring him to juſtice, that he may make ſatisfaction to our lord the king.

5. The chattles of thoſe who are under forfeiture to the king ought not to be detained in any church, or church-yard, againſt the king's juſticiary; becauſe they belong to the king, whether they are found within churches or without.

6. The ſons of villeins ought not to be ordained without the conſent of their lords, in whoſe lands they are known to have been born.

It may not be here unneceſſary to remark to the reader that there is a tranſcript of the Conſtitutions of Clarendon from the *Cottonian* manuſcript of Becket's life and epiſtles, which is probably the moſt antient and correct copy, in lord Lyttleton's life of Henry the ſecond.

Theſe ſtatutes were not only enacted by the advice and authority of parliament, but after a ſtrict enquiry into the law and cuſtoms of the realm anterior to that time; and which theſe ſtatutes only revived and confirmed. The preamble ſays, "in præſentiâ "ejuſdem regis facta eſt iſta recordatio vel recognitio cujus dam "partis conſuetudinum, et libertatum et dignitatum ante ceſſo- "rum ſuorum, videlicet, regis Henrici avi ſui et aliorum, quæ "obſervari et teneri debent in regno."

NOTE [B] p. 140.

The editor of the laſt edition of this hiſtory, thought proper to ſubjoin the following note, on the ſentence to which the preſent note refers. "Notwithſtanding what our author here writes, it "appears by Glanville and others, that the common pleas was then "alſo in being, and magna charta has only fixed that court to a "certain

"certain place which before was moveable and uncertain." Sir "Edward Coke, it is true, ſtrongly contends for the ſame poſition. "For the antiquity of the court of common pleas, they err (ſays "ſir Edward) that hold that before the ſtatute of magna charta "there was no court of common pleas, but had his creation by or "after that charter; for the learned know, that in the ſix and "twentieth year of Edward the third, the abbot of B. in a writ "of aſſize brought before the juſtices in Eire, claimed conuſance "and to have writs of aſſize, and other original writs out of "the king's court by preſcription, time out of mind of man, "in the reigns of ſaint Edmond, and ſaint Edward the confeſ- "ſor before the conqueſt. And on the behalf of the abbot "were ſhewed divers allowances thereof in former times in the "king's courts, and that king Henry the firſt confirmed their "uſages, and that they ſhould have conuſance of pleas, ſo that "the juſtices of the *one bench or the other* ſhould not intermeddle. "And the ſtatute of magna charta erecteth no court, but giveth "direction for the proper juriſdiction thereof in theſe words. "Communia placita non ſequantur curiam noſtram, ſed tenean- "tur in aliquo certo loco. And properly the ſtatute ſaith, *non* "*ſequantur*, for that the king's-bench did in thoſe days follow "the king *ubicunque fuerit in Angliâ*, and therefore enacteth that "common pleas ſhould be holden in a court reſident in a certain "place. In the next chapter of magna charta, (made at one "and the ſame time) it is provided; et ea, quæ per eoſdem, "(ſ. juſticiarios et itinerantes) propter difficultatem aliquorum "articulorum terminari non puſſunt, referantur ad juſticiarios "noſtro de banco, et ibi terminentur. And in the next to that, "aſſiſæ de ultimâ præſentatione ſemper capiantur coram juſtici- "ariis de banco, et ibi terminentur. Therefore it manifeſtly "appeareth, that at the making of the ſtatute of magna charta "there were juſticiarii de banco, which all men confeſs to "be the court of common pleas. And therefore that court was "not erected by or after that ſtatute." Co. Lit. 71. b. From the whole of lord Coke's obſervations here and in the preface to his eighth book of reports, it ſeems to have been his opinion, that the court of common pleas was not only a diſtinct court at the time of making the magna charta of the 9th of Henry III. but alſo exiſted as ſuch before the conqueſt. But according to Mr. Maddox, whoſe inquiries into the ſubject were certainly more minute and particular, the origin of the court of common pleas is of a much later date. He ſo far agrees with lord Coke, as to admit, that the magna charta of Henry the third, rather confirm- ed than erected the bank or common pleas, and that ſuch a court was in being ſeveral years before the magna charta of the 17th of king John, though it was then firſt made ſtationary.

But in other reſpects lord Coke and Mr. Maddox differ widely; for the latter thinks, that for ſome time after the conqueſt there was one great and ſupreme judicature called the curia regis, which he ſuppoſes to have been of Norman and not of Anglo Saxon original, and to have exerciſed juriſdiction over common as well as other pleas; that the common pleas and exchequer were gradually ſeparated from the curia regis and became juriſdictions wholly diſtinct from it: and that the ſeparation of the common pleas began in the reign of the firſt Richard, or early in the reign of John, and was completed by Henry the third. See Mad. hiſt. excheq. fol. ed. 63. and the chapter on the diviſion of the king's courts 539. See farther, 3 Blackſt. Comment. 5th ed. 37. 4 Inſt. 99. Lamb. Archeion. ed. 1635. p. 24. to 34. and the books cited in Pryn, on 4 Inſt. 52. Harg. note 2. on Co. Lit. 71. b. and ſee Sullivan lect. xxxii. and Barring. on ſtat. 10. Lord Bacon ſuppoſes that the court of common pleas was erected in the reign of Henry the third. Vol. 2. 378.

NOTE [C] p. 145.

In the time of John, the rigours of the feodal ſyſtem and the foreſt laws were ſo warmly maintained, that they occaſioned many inſurrections. At length, however, the confederated barons and the king agreed on a conference, which was appointed to be held at Runnemede, between Windſor and Staines; a place which has ever ſince been extremely celebrated on account of this great event. The two parties encamped apart, like open enemies; and after a debate of a few days, the king, with a facility which was ſomewhat ſuſpicious, ſigned and ſealed the charter which was required of him. This famous deed, commonly called the great charter, either granted or ſecured very important liberties and privileges to every order of men in the kingdom.

It confirmed many liberties of the church, and redreſſed many grievances incident to feodal tenures, of no ſmall moment at the time; though now, unleſs conſidered attentively and with this retroſpect, they ſeem but of trifling concern. But, beſides theſe feodal proviſions, care was alſo taken therein to protect the ſubject againſt other oppreſſions, then frequently ariſing from unreaſonable amercements, from illegal diſtreſs or other proceſs for debts or ſervices due to the crown, and from the tyrannical abuſe of the prerogative of purveyance and pre-emption. It fixed the forfeiture of lands for felony in the ſame manner as it ſtill remains; prohibited for the future the grants of excluſive fiſheries, and the erection of new bridges ſo as to oppreſs the neighbourhood. With reſpect to private rights: it eſtabliſhed the teſta-

teſtamentary power of the ſubject over part of his perſonal eſtate, the reſt being diſtributed among his wife and children; it laid down the law of dower, as it hath continued ever ſince; and prohibited the appeals of women, unleſs for the death of their huſbands. In matters of public police and national concern: it injoined an uniformity of weights and meaſures; gave new encouragements to commerce, by the protection of merchant ſtrangers; and forbad the alienation of lands in mortmain. With regard to the adminiſtration of juſtice: beſides prohibiting all denials or delays of it, it fixed the court of common pleas at Weſtminſter, that the ſuitors might no longer be harraſſed with following the king's perſon in all his progreſſes; and at the ſame time brought the trial of iſſues home to the very doors of the freeholders, by directing aſſizes to be taken in the proper counties, and eſtabliſhing annual circuits: it alſo corrected ſome abuſes then incident to the trials by wager of law and of battel; directed the regular awarding of inqueſts for life or member; prohibited the kings inferior miniſters from holding pleas of the crown, or trying any criminal charge, whereby many forfeitures might otherwiſe have unjuſtly accrued to the exchequer; and regulated the time and place of holding the inferior tribunals of juſtice, the county court, ſheriff's tourn, and court leet. It confirmed and eſtabliſhed the liberties of the city of London, and all other cities, boroughs, towns, and ports of the kingdom. And, laſtly, (which alone would have merited the title that it bears, of the great charter) it protected every individual of the nation in the free enjoyment of his life, his liberty, and his property, unleſs declared to be forfeited by the judgment of his peers or the law of the land. Vide Black. Com. 4 v. 423. 424. See alſo Mr. juſtice Blackſtone's tract, which is an excellent edition of the great charter with an introductory hiſtorical diſcourſe. To inſure the obſervance of the great charter, John allowed the barons to chuſe five and twenty members from their own body, as conſervators of the public liberties. If any complaint was made of a violation of the charter, any four of theſe barons might admoniſh the king to redreſs the grievance; and if ſatisfaction was not obtained, they could aſſemble the whole council of twenty-five; who, in conjunction with the great council, were empowered to compel him. All men throughout the kingdom, were bound, to ſwear obedience to the five and twenty barons; and the freeholders of each country were to chuſe twelve knights, who were to make report of ſuch evil cuſtoms as required redreſs, conformable to the tenor of the great charter (*a*).

Thoſe

(*a*) Mat. Paris, 181. This houſe of commons was not then in being; otherwiſe the knights ſeems a certain proof that the

Thoſe men were, by this convention, really inveſted with the ſovereignty of the kingdom: were rendered co-ordinate with the king, or rather ſuperior to him, in the exerciſe of the executive power: and as there was no circumſtance of government, which, either directly or indirectly, might not bear a relation to the ſecurity or obſervance of the great charter; there could ſcarce occur any incident, in which they might not lawfully interpoſe their authority. Hume.

NOTE [D] p. 147.

Fines, amerciaments, and OBLATAS, as they were called, were a conſiderable branch of the royal power and revenue. The antient records of the exchequer, which are ſtill preſerved, give ſurprizing accounts of the numerous fines and amerciaments levied in thoſe days, (*a*) and of the ſtrange inventions fallen upon to exact money from the ſubject. It appears, that the old kings of England put themſelves entirely on the footing of the barbarous eaſtern princes, whom no man muſt approach without a preſent, who ſell all their good offices, and intrude themſelves into every buſineſs, that they may have a pretence of extorting money. Even juſtice was avowedly bought and ſold; the king's court itſelf, though the ſupreme judicature of the kingdom, was open to none that brought not large preſents to the king; the bribes given for the expedition, delay, (*b*) ſuſpenſion, and, doubtleſs, for the perverſion of juſtice, were entered in the public regiſters of the royal revenue, and remain as monuments of the perpetual iniquity and tyranny of the times. The barons of the exchequer, for inſtance the firſt nobility of the kingdom, were not aſhamed to inſert, as an article in their records, that the county of Norfolk paid a ſum, that they might be fairly dealt with; (*c*) the borough of Yarmouth, that the king's charters, which they have for their liberties, might not be violated; (*d*) Richard, ſon of Gilbert, for the king's helping him to recover his debt from the Jews; (*e*) Serlo, ſon of Terlavaſton, that he might be permitted to make his defence, in caſe he was accuſed of a certain homicide; (*f*) Walter de Burton for free law, if accuſed of

and burgeſſes from the ſeveral counties could have given in to the lords a liſt of the grievances, without any new election.

(*a*) Madox's Hiſt. Exch. 272.

(*b*) Id. 274, 309.

(*c*) Id. 295.

(*d*) Id. ibid.

(*e*) Madox's Hiſt. Exch. 296. He paid two hundred marks, a great ſum in thoſe days.

(*f*) Id. 296.

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wounding another; (*g*) Robert de Eſſart for having an inqueſt to find whether Roger, the butcher, and Wace and Humphry, accuſed him of robbery and theft out of envy and ill-will or not; (*h*) William Buhuſt for having an inqueſt to find whether he was accuſed of the death of one Godwin out of ill-will or for juſt cauſe. (*i*) Theſe few inſtances are ſelected from a great number of a like kind, which Madox ſelected from a ſtill greater number, preſerved in the antient rolls of the exchequer. (*k*)

Sometimes the party litigant proffered the king a certain portion; a half, a third, a fourth; payable out of the debts, which he, as the executor of juſtice, ſhould aſſiſt him in recovering. (*l*) Theophania de Weſtland agreed to pay the half of 212 marks, that ſhe might recover that ſum againſt James de Fugleſton; (*m*.) Solomon the Jew engaged to pay one mark out of every ſeven that he ſhould recover againſt Hugh de la Hoſe; (*n*) Nicholas Morrel promiſed to pay ſixty pound, that the earl of Flanders might be diſtrained to pay him 343 pound, which the earl had taken from him; and this was to be paid out of the firſt money that Nicholas ſhould recover of the earl. (*o*) There were no profits ſo ſmall as to be below the king's attention—his protection and good offices of every kind were bought and ſold. See Madox's hiſt. Exch. 298, to 359.

NOTE [E] p. 148.

Our anceſtors, as an infalliable method of diſcovering truth, and of guarding againſt deception, appealed to heaven, and referred every point in diſpute to be determined, as they imagined, by the deciſions of unerring wiſdom and impartial juſtice. The perſon accuſed, in order to prove his innocence, ſubmitted, in ſome caſes, to trial, by plunging his arm in boiling water; by lifting a red-hot iron with his naked hand; by walking barefoot over burning plough-ſhares; or by other experiments equally perilous and formidable. On other occaſions, he challenged his accuſer to fight him in ſingle combat. All theſe various forms of trial were conducted with many devout ceremonies; the miniſters of religion were employed, the Almighty was called upon to interpoſe for the manifeſtation of guilt, and for the protection of innocence; and whoever eſcaped unhurt, or came off victori-

(*g*) Id. ibid.
(*h*) Id. 298.
(*i*) Id. 302.
(*k*) Chap. 12.
(*l*) Id. 311.
(*m*) Id. ibid.
(*n*) Id. 79, 312.
(*o*) Id. 312.

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ous, was pronounced to be acquitted by the judgment of God. (*a*)

Among all the whimſical and abſurd inſtitutions which owe their exiſtence to the weakneſs of human reaſon, this, which ſubmitted queſtions that affected the property, the reputation, and the lives of men, to the determination of chance, or of bodily ſtrength and addreſs, appears to be the moſt extravagant and prepoſterous. There were circumſtances, however, which led the nations of Europe to conſider this equivocal mode of deciding any point in conteſt, as a direct appeal to heaven, and a certain method of diſcovering its will. As men are unable to comprehend the manner in which the Almighty carries on the government of the univerſe, by equal, fixed, and general laws, they are apt to imagine, that in every caſe which their paſſions or intereſt render important in their own eyes, the ſupreme Ruler of all, ought viſibly to diſplay his power, in vindicating innocence and puniſhing vice. It requires no inconſiderable degree of ſcience and philoſophy to correct this popular error. But the ſentiments prevalent in Europe during the dark ages, inſtead of correcting, ſtrengthened it. Religion, for ſeveral centuries, conſiſted chiefly in believing the legendary hiſtory of thoſe ſaints whoſe names croud and diſgrace the Romiſh calendar. The fabulous tales concerning their miracles, had been declared authentic by the bulls of popes, and the decrees of councils; they made the great ſubject of the inſtructions which the clergy offered to the people, and were received by them with implicit credulity and admiration.

By theſe, men were accuſtomed to believe that the eſtabliſhed laws of nature might be violated on the moſt frivolous occaſions, and were taught to look rather for particular and extraordinary acts of power under the divine adminiſtration, than to contemplate the regular progreſs and execution of a general plan. One ſuperſtitution prepared the way for another; and whoever believed that the ſupreme Being had interpoſed miraculouſly on thoſe trivial occaſions mentioned in legends, could not but expect his intervention in matters of greater importance, when ſolemnly referred to his deciſion. Dr. Robert. hiſt. Cha. V. 1 v. oct. 59. ſeq. And ſee Mr. juſtice Blackſtone's Commentaries, lib. 4. cap. 27. The canon law very early declared againſt trial by ordeal, or *vulgaris purgatio*, as being the fabric of the devil, "cum ſit contra praeceptum Domini, non tentabis Dominum "Deum tuum." Decret. part 2. cauſ. 2. qu. 5. diſt. 7. Decretal lib. 3. tit. 50. c. 9. and Spelm. Gloſs. 435. Upon

(*a*) Murat. Diſſertatio de judiciis Dei. Antiquit. Italic. Vol. 3. p. 612.

this

this authority, though the canons themſelves were of no validity in England, it was thought proper (as had been done in Denmark above a century before. See Mod. Un. hiſt. xxxii. 105.) to diſuſe and aboliſh this mode of trial entirely in our courts of juſtice, by an act of parliament in 3 Hen. III. according to ſir Edward Coke, 9 Rep. 32. or rather by an order of the king in council. 1 Rym. Foed. 228. Spelm. Gloſs. 326. 2 Pryn. Rec. Append. 20. Seld. Eadm. fol. 48.

NOTE [F] p. 158.

The chief advantage, which the people of England reaped, and ſtill continue to reap, from the reign of this great prince, was the correction, extenſion, amendment, and eſtabliſhment of the laws, which Edward maintained in great vigour, and left much improved to poſterity: for the work of wiſe legiſlators commonly remain; while the acquiſitions of conquerors often periſh with them. This merit has juſtly gained to Edward the appellation of the Engliſh JUSTINIAN. Not only the numerous ſtatutes, paſſed in his reign, touch the chief points of juriſprudence, and, according to ſir Edward Coke, (*a*) truly deſerve the name of eſtabliſhments, becauſe they were more conſtant, ſtanding, and durable laws than any made ſince; but the regular order of his adminiſtration gave an opportunity to the common law to refine itſelf, and brought the judges to a certainty in their determinations, and the lawyers to a preciſion in their pleadings. Sir Matthew Hale has remarked the ſudden improvement of Engliſh law during this reign; and ventures to aſſert, that, till his own time, it had never received any conſiderable encreaſe.

(*a*) 2 Inſt. 156.

CHAP.

CHAP. VIII.

A brief continuation of the progreſs of the laws, from the time of king Edward II. *inclusive, down to theſe times.*

HAVING in the former chapter been ſomewhat large in diſcourſing of the progreſs of the laws, and the incidental additions they received in the ſeveral reigns of king William II. king Henry I. king Stephen, king Henry II. king Richard I. king John, king Henry III. and king Edward I. I ſhall now proceed to give a brief account of the progreſs thereof in the time of Edward II. and the ſucceeding reigns, down to theſe times.

Edward II. ſucceeding his father, though he was an unfortunate prince, and by reaſon of the troubles and uneveneſs of his reign, the very law itſelf had many interruptions, yet it held its current, in a great meaſure according to that frame and ſtate that his father had left it in.

Beſides the records of judicial proceedings in his time, many whereof are ſtill extant; there were ſome other things that occurred in his reign, which give us ſome kind of indication of the ſtate and condition of the law during that reign: as,

Firſt, the ſtatutes made in his time, eſpecially that of 17 E. 2. ſtiled DE PREROGATIVA REGIS; which though it be called a ſtatute, yet for the moſt part is but a ſum, or collection, of certain of the king's prerogatives that were known law long before; as for inſtance, the king's wardſhip of lands IN CAPITE, attracting the wardſhip of lands held of others; the king's grant of a manor, not carrying an advowſon appendant unleſs named; the king's title to the eſcheat of the lands of the Normans; which was in uſe from the firſt defection of Normandy under king John; the king's title to wreck,—royal fiſh,—treaſure trove, and many others; all of which were ancient prerogatives to the crown. (*a*)

Secondly, the reports of the years and terms of this king's reign; theſe are not printed in any one entire volume, or

(*a*) Vide Barring. on ſtat. 179. ſeq.

in any ſeries or order of time, only ſome BROKEN CASES thereof in Fitzherbert's abridgment, and in ſome other books diſperſedly; yet there are many entire copies thereof abroad very excellently reported, wherein are many reſolutions agreeing with thoſe of Edward the firſt's time. The beſt copy of theſe reports that I know now extant, is that in Lincoln's-inn library, which gives a fair ſpecimen of the learning of the pleaders and judges of that time. (*b*)

King Edward III. ſucceeded his father; his reign was long, and UNDER IT THE LAW WAS IMPROVED TO THE GREATEST HEIGHT. The judges and pleaders were very learned, and the pleadings are ſomewhat more poliſhed than thoſe in the time of Edward I. yet they have neither UNCERTAINTY, PROLIXITY, NOR OBSCURITY. They were PLAIN AND SKILFUL, and in the rules of law, eſpecially in relation to real actions, and titles of inheritance, VERY LEARNED AND EXCELLENTLY POLISHED, and exceeded thoſe of the time of Edward I. So that at the latter end of this king's reign the law ſeemed to be near its meridian. (*c*)

The reports of this king's time run from the beginning, to the end of his reign; excepting ſome few years between

(*b*) See the firſt volume of the year-books, edit. 1678. intituled, "les reports des caſes argue & adjudge in le temps del' roy Edward le ſecond. Solonq; les ancient manuſcripts ore remanent en les maines de ſir Jehan' Maynard chevaler, ſerjeant de la ley al ſa tres excellent majeſty le roy Charles le ſecond."—This is the old book, of reports "of the years and terms" of Edward the ſecond, to which ſir Matthew Hale alludes: and it ſhould ſeem that theſe reports were firſt publiſhed, in conſequence of ſir Matthew's recommendation, in the caſe of Sacheverell and Frogatt, M ch. 23 Car. II. Mr. Selden, to whom knowledge of this kind was perfectly familiar, ſays, the compiler of theſe reports was one Richard de Winchedon, who lived in the reign of Edward II.—There is ſome ſmall variation in the copies. Vide Seld. Diſſert. Flet. 528, 529.

(*c*) "In the reign of Edward III. pleadings (in the opinion of ſir Edward Coke) grew to perfection, both without lameneſs and curioſity; for then the judges and profeſſors of the law were excellently learned, and then knowledge of the law flouriſhed: the ſerjeants of the law, &c. drew their own pleadings, and therefore truly ſaid that reverend juſtice Thirning, in the reign of Henry IV. that in the time of Edward III. the law was in a higher degree than it had been any time before; for (ſaith he) before that time the manner of pleading was but feeble, in compariſon of that it was afterwards in the reign of the ſame king."—1 Inſt. 304. b.

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the 10th and 17th, and 30th and 33d years of his reign; but those omitted years are extant in many hands in old manuscripts.

The BOOK OF ASSIZES, is a collection of the assizes that happened in the time of Edward III. being from the beginning to the end extracted out of the books and assizes of those that attended the assizes in the country. *(d)*

The justices itinerant continued by intermitting vicissitudes, till about the 4th of Edward III. and some till the 10th of Edward III. Their jurisdiction extended to pleas of the crown, or criminal causes, civil suits and pleas of liberties, and quo warranto; the reports thereof are not printed, but are in many hands in manuscript, both of the times of Edward I. Edward II. and Edward III. full of excellent learning. Some few broken reports of those eyres, especially of Cornwal, Nottingham, Northampton, and Derby, are collected by Fitzherbert in his abridgment.

After the 10th of Edward III. I do not find any justices errant ad communia placita, but only ad placita forestæ; other things that concerned those justices itinerant were supplied and transacted in the common bench for communia placita, in the king's-bench and exchequer for placita de libertatibus; and before justices of assize, nisi prius, oyer and terminer, and gaol delivery, for assizes and pleas of the crown.

And thus much for the law in the time of Edward III. [A.]

Richard II. succeeding his grandfather, the dignity of the law, together with the honour of the kingdom, by reason of the weakness of this prince, and the difficulties occurring in his government, SEEMED SOMEWHAT TO DECLINE; as may appear by comparing the twelve last years of Edward III. commonly called quadragesms, with the reports of king Richard II. wherein appears a visible declination of the learning and depth of the judges and pleaders.

(*d*) Vide "le livre des assises," which is the fifth volume of the year books. Ed. 1679.

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It is true, we have no printed continued report of this king's reign; but I have ſeen the entire years and terms thereof in a manuſctipt, out of which, or ſome other copy thereof, I ſuppoſe Fitzherbert abſtracted thoſe broken caſes of this reign in his abridgment.

In all thoſe former times, eſpecially from the end of Edward III. back to the beginning of Edward I. the learning of the common law conſiſted principally in aſſizes and REAL ACTIONS; and rarely was any title determined in any perſonal action; unleſs in caſes of titles to rents, or ſervices by replevin; and the reaſons thereof were principally theſe, viz.

Firſt, becauſe theſe ancient times were great favourers of THE POSSESSOR; and therefore if about the time of Edward II.—a diſſeiſor had been in poſſeſſion by a year and a day, he was not to be put out without a recovery by aſſize. Again, if the diſſeiſor had made a feoffment, they did not countenance an entry upon the foeffeé, becauſe thereby he might loſe his warranty, which he might ſave, if he were impleaded in an aſſize or writ of entry; and by this means real actions were frequent, and alſo aſſizes.

Secondly, they were willing to quiet men's poſſeſſions; and therefore after a recovery or bar in an aſſize or real action, the party was driven to an action of a higher nature.

Thirdly, becauſe there was then no known action, wherein a perſon could recover his poſſeſſion, other than by an aſſize or real action, for till the end of Edward IV. the poſſeſſion was not recovered in an ejectione firmæ; but ONLY DAMAGES.

Fourthly, becauſe an aſſize was a ſpeedy and effectual remedy to recover a poſſeſſion; the jury being ready impapannelled and at the bar the firſt day of the return. And although by diſuſage, the practiſers of law are not ſo ready in it, yet the courſe thereof in thoſe times was as ready and as well known to all profeſſors of the law, as the courſe of ejectione firmæ is now. [B.]

Touching the reports of the years and terms of Henry IV. and Henry V. I can only ſay, they do not arrive either in the nature of the learning contained in them, or in the judiciouſneſs and knowledge of the judges and pleaders, nor

in any other reſpect ariſe, to the perfection of the laſt twelve years of Edward III.

But the times of Henry VI. as alſo of Edward IV. Edward V. and Henry VII. were times that abounded with learning and excellent men. There is little odds in the uſefulneſs or learning of theſe books, only the firſt part of Henry VI. is more barren, ſpending itſelf much in learning of little moment, and now out of uſe; but the ſecond part is full of excellent learning. [C]

In the times of thoſe three kings, Henry VI. Edward IV. and Henry VII. the learning ſeems to be much alike. But theſe two things are obſervable in them, and indeed generally in all reports after the time of Edward III. viz.

Firſt, that real actions and aſſizes were not ſo frequent as formerly; for many titles of land were determined in perſonal actions; and the reaſons hereof ſeem to be,

Firſt, becauſe the learning of them began by little and little to be leſs known or underſtood.

Secondly, the ancient ſtrictneſs of preſerving poſſeſſion to poſſeſſors till eviction by action, began not to be ſo much in uſe; unleſs in caſes of deſcents and diſcontinuances;—the latter neceſſarily drove the demandant to his formedon, or his cui in vita, &c. But the deſcents that told entry (*e*) were rare, becauſe men preſerved their rights to enter, &c. by continual claims.

Thirdly, becauſe the ſtatute of 8 H. VI. had helped men to an action to recover their poſſeſſions by a writ of forcible entry, even while the method of recovery of poſſeſſions by ejectments was not known or uſed.

The ſecond thing obſervable is, that though pleadings in the times of thoſe kings were far SHORTER than afterwards; eſpecially after Henry VIII.—yet they were much longer than in the time of king Edward III. and the pleaders, yea and the judges too, became ſomewhat TOO CURIOUS therein, ſo that that art or dexterity of pleading, which in its uſe,

(*e*) In other words, that *take away* entry. Vide Blac. Com. 3 v. 176.—The word toll, as here applied by ſir Matthew Hale, meaning, to bar, to defeat, or to take away. See ſtat. 8 Hen. VI. cap. 9.

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nature and deſign, was only TO RENDER THE FACT PLAIN AND INTELLIGIBLE, AND TO BRING THE MATTER TO JUDGMENT WITH A CONVENIENT CERTAINTY,—began to degenerate from its primitive ſimplicity, and the true uſe and end thereof, and to become A PIECE OF NICETY AND CURIOSITY; which how theſe later times have improved, the length of the pleadings, the many and unneceſſary repetitions, the many miſcarriages of cauſes upon ſmall and trivial niceties in pleading, have too much witneſſed. *(f)*

I ſhould now ſay ſomething touching the times ſince Henry VII. to this day, and therefore ſhall conclude this chapter with ſome general obſervations touching the proceedings of law in theſe later times.

And firſt, I ſhall begin where I left before, touching the length and nicety of pleadings, which at this day far exceeds not only that ſhort, yet perſpicuous, courſe of pleading, which was in the time of Henry VI. Edward IV. and Henry VII. but thoſe of all times whatſoever; as our vaſt preſſes of parchment for any one plea, do abundantly witneſs.

And the reaſons thereof ſeem to be theſe, viz.

Firſt, becauſe in ancient times the pleadings were drawn AT THE BAR, and the exceptions alſo taken at the bar; which were rarely taken for the pleaſure, or curioſity, of the pleader; but only, when it was apparent, that the omiſſion, or the matter excepted to, was for the moſt part

(f) What would ſir Matthew Hale have ſaid, had he lived in theſe times of "nicety and curioſity?" —— times in which pleading ſhould ſeem to be involved in all that perplexity can ſuggeſt, or prolixity ſupply! He might, perhaps, impute it to incapacity, or to deſign; in either light a reproach to thoſe, whoſe duty it is, not only to be well informed of the merits of a cauſe, but to apply the pleadings to the real point in controverſy; and that in a mode the moſt ſimple and intelligible—The earl of Mansfield, who, with the moſt comprehenſive and enlightened genius, poſſeſſes the moſt conſummate and enlarged knowledge, has remarked, that "the ſubſtantial rules of pleading are founded in ſtrong ſenſe, and in the ſoundeſt and cloſeſt logic; and ſo appear, when well underſtood and explained: though, by being miſunderſtood and miſapplied, they are often made uſe of as inſtruments of chicane." 1 Burr. 319. in the caſe of Robinſon v. Raley.

THE VERY MERIT AND LIFE OF THE CAUSE; and purpoſely omitted, or miſpleaded, becauſe his matter, or cauſe, would bear no better: but now, the pleadings being firſt drawn in writing, are drawn to an EXCESSIVE LENGTH, AND WITH VERY MUCH LABORIOUSNESS AND CARE ENLARGED, leſt it might afford an exception not intended by the pleader, and which could be eaſily ſupplied from the truth of the caſe; leſt the other party ſhould catch that advantage which commonly the adverſe party ſtudies;—not in contemplation of the merits, or juſtice, of the cauſe, but to find a ſlip to faſten upon; though in truth, either not material to the merits of the plea, or at leaſt not to the merits of the cauſe, if the plea were in all things conformable to it.

Secondly, becauſe thoſe parts of pleading which in ancient times might perhaps be material, but at this time are become only mere ſtyles and forms, are ſtill continued with much religion; and ſo all thoſe ancient forms at firſt introduced for convenience, but NOW NOT NECESSARY, or it may be, antiquated as to their uſe, are yet continued as things wonderfully material, though THEY ONLY SWELL THE BULK, and contribute nothing to the weight of the plea.

Thirdly, theſe pleas being moſtly drawn by clerks, who are paid for entries and copies thereof, the larger the pleadings are, the more profits come to them, and the dearer the clerk's place is, the dearer he makes the client pay.

Fourthly, an overforwardneſs in courts to give countenance to frivolous exceptions, though they make nothing to the true merits of the cauſe; whereby it often happens that cauſes are not determined according to their merits, but do often miſcarry for inconſiderable omiſſions in pleading (*g*).

But, ſecondly, I ſhall conſider what is the reaſon that in the time of Edward I.—one term contained not above two or three hundred rolls, but at this day, one term, contains two thouſand rolls, or more.

(*g*) However pertinent this fourth reaſon of ſir Matthew Hale, might have been heretofore, yet, I ruſt, that it is not now in the leaſt applicable.

The

The reaſons whereof may be theſe, viz.

Firſt, many petty buſineſſes, as treſpaſſes and debts under 40 s. are now brought to Weſtminſter, which uſed to be diſpatched in the county, or hundred courts; and yet the plaintiffs are not to be blamed, becauſe at this day thoſe inferior courts are ſo ill ſerved, and juſtice there ſo ill adminiſtred, that they had better ſeek it (where it may be had) at Weſtminſter, though at ſomewhat more expence (*b*).

Secondly, multitudes of attornies practiſing in the great courts at Weſtminſter, who are ready at every market to gratify the ſpleen, ſpite or pride, of every plaintiff.

Thirdly, a great increaſe of people in this kingdom above what they were anciently, which muſt needs multiply ſuits.

Fourthly, a great increaſe of trade and trading perſons, above what there were in ancient times, which muſt have the like effect.

Fifthly, multitudes of new laws, both penal and others, all which breed new queſtions, and new ſuits at law, and in particular, the ſtatute touching the deviſing of lands, cum multis aliis.

Sixthly, the multiplication of actions upon the caſe, which were rare formerly, and thereby wager of law ouſted, which diſcouraged many ſuits: for when men were ſure, that in caſe they reſted upon a bare contract without ſpecialty, the other party might wage his law; they would not reſt upon ſuch contracts without reducing the debt into a ſpecialty, if it were of any value; which created much certainty, and accorded many ſuits.

And herewith I ſhall conclude this chapter, ſhewing what progreſs the law has made, from the reign of king Edward I. down to theſe times (*i*).

(*b*) But this is now in ſome degree remedied by the erection of courts of conſcience for the recovery of ſmall debts.

(*i*) Mr. Juſtice Blackſtone having, in the moſt elegant and judicious manner, continued this plan of ſir Matthew Hale, from the reign of Henry VII. to that of his preſent majeſty, I therefore take the liberty of referring the reader to the fourth volume of the Commentaries of that learned judge —from page 429 to 443, incluſive.

ADDITIONAL NOTES

TO THE

EIGHTH CHAPTER.

NOTE [A] p. 174.

THE old Gothic powers of electing the principal ſubordinate magiſtrates, the ſheriffs, and conſervators of the peace, were taken from the people in the reigns of Edward II. and Edward III. and juſtices of the peace eſtabliſhed inſtead of the latter. Black. Com. 4 v. 428. In the reign alſo of Edward the third, the parliament, continues Mr. juſtice Blackſtone, "is "ſuppoſed moſt probably to have aſſumed its preſent form, by "a ſeparation of the commons from the lords." Id.—It is remarked by an elegant hiſtorian, (*a*) that conquerors, though uſually the bane of human kind, proved often, in the feudal times, the moſt indulgent of ſovereigns: they ſtood moſt in need of ſupplies from their people; and not being able to compel them by force to ſubmit to the neceſſary impoſitions, they were obliged to make them ſome compenſation, by equitable laws and popular conceſſions. This remark is, in ſome meaſure, though imperfectly, juſtified by the conduct of Edward III. He took no ſteps of moment without conſulting his parliament, and obtaining their approbation, which he afterwards pleaded as a reaſon for their ſupporting his meaſures. (*b*) The parliament therefore roſe into greater conſideration during his reign, and acquired a more regular authority than in any former times; and even the houſe of commons, which, during turbulent and factious periods, was naturally oppreſſed by the greater power of the crown and barons, began to appear of ſome weight in the conſtitution.

The ſtatute for defining and aſcertaining treaſons was one of the firſt productions of this new modelled aſſembly. Black. Com. 4 v. 428. In truth one of the moſt popular laws, enacted by any prince, was the ſtatute, which paſſed in the twenty-

(*a*) Dr. Robertſon's Hiſt. Scot. lib. 1. (*b*) Cotton's Abridg. p. 108, 120.

fifth

fifth of this reign, (*c*) and which limited the caſes of high treaſon, before vague and uncertain, to three principal heads,—the conſpiring the death of the king, the levying war againſt him, and the adhering to his enemies; and the judges were prohibited, if any other caſes ſhould occur, from inflicting the penalty of treaſon, without an application to parliament. The bounds of treaſon were indeed ſo much limited by this ſtatute, which ſtill remains in force without any alteration, that the lawyers were obliged to enlarge them, and to explain a conſpiracy for levying war againſt the king, to be equivalent to a conſpiracy againſt his life, and this interpretation, ſeemingly forced, has, from the neceſſity of the caſe been tacitly acquieſced in. Hume.—Mr. juſtice Blackſtone has enumerated ſome other legal improvements, which were effectuated under the auſpices of this brave and indulgent ſovereign. Vide Black. Com. 4 v. 428.

NOTE [B] p. 175.

The ſtatutes alſo of *praemunire*, for effectually depreſſing the civil power of the pope, were the work of this and the precedent reign. And the eſtabliſhment of a laborious parochial clergy, by the endowment of vicarages out of the overgrown poſſeſſions of the monaſteries, added luſtre to the cloſe of the fourteenth century: though the ſeeds of the general reformation, which were thereby firſt ſown in the kingdom, were almoſt overwhelmed by the ſpirit of perſecution, introduced into the laws of the land, by the influence of the regular clergy. Black. Com. 4 v. 428. It was uſual at this time for the church, that they might elude the mortmain act, to make their votaries leave lands in truſt to certain perſons, under whoſe name the clergy enjoyed the benefit of the bequeſt: the parliament ſtopt the progreſs of this abuſe. (*a*) The greateſt novelty introduced into the civil government during this reign, was the creation of peers BY PATENT. The lord Beauchamp of Holt was the firſt peer, who was advanced to the houſe of lords, in this manner.

NOTE [C] p. 176.

From the time of Richard the ſecond, to that of Henry the ſeventh, the civil wars and diſputed titles to the crown gave no leiſure for farther juridical improvement: "*nam ſilent leges inter* "*arma*," and yet to theſe very diſputes we owe the happy loſs

(*c*) Chap. 2. (*a*) Knyghton, p. 27, 38. Cotton, p. 355.

of all the dominions of the crown on the continent of France, which turned the minds of ſubſequent princes entirely to domeſtic concerns. To theſe likewiſe we owe the method of barring entails by the fiction of common recoveries, invented originally by the clergy to evade the ſtatute of mortmain, but introduced under Edward the fourth, for the purpoſe of unfettering eſtates, and making them more liable to forfeiture: while, on the other hand, the owners endeavoured to protect them by the univerſal eſtabliſhment of *uſes*, another of the clerical inventions. Blac. Com. 4 v. 428. A remarkable law paſſed in the reign of Henry VI. for the due election of members of parliament in counties. After the fall of the feudal ſyſtem, the diſtinction of tenures was in a great meaſure loſt; and every freeholder, as well thoſe who held of meſne lords, as the immediate tenants of the crown, were by degrees admitted to give their votes at elections. This innovation was confirmed by a law of Henry the fourth, (*a*) which gave right to ſuch a multitude of electors, as was the occaſion of great diſorder in the eighth and tenth of this king; therefore, laws were enacted, limiting the electors to ſuch as poſſeſſed forty ſhillings a year in land, free from all burden within the county. (*b*) This ſum was equivalent to near twenty pounds a year of our preſent money; and it were to be wiſhed, that the ſpirit, as well as letter of this law, had been maintained.

The preamble of the ſtatute is remarkable: "Whereas the "elections of knights, have of late, in many counties of Eng- "land, been made by outrageous and exceſſive numbers of peo- "ple, many of them of ſmall ſubſtance and value, yet pre- "tending to a right equal to the beſt knights and eſquires; "whereby manſlaughters, riots, batteries, and diviſions among "the gentlemen and other people of the ſame counties, ſhall "very likely riſe and be, unleſs due remedy be provided in this "behalf, &c." We may learn from theſe expreſſions what an important matter the election of a member of parliament was now become in England: that aſſembly was beginning in this period to aſſume great authority: the commons had it much in their power to enforce the execution of the laws; and if they failed in their duty, in this particular, it proceeded leſs from any exorbitant power of the crown, than from the licentious ſpirit of the ariſtocracy, and perhaps from the rude education of the age, and their own want of a due ſenſe of the advantages reſulting from a regular adminiſtration of juſtice. As to the reign of Henry the ſeventh, his miniſters (not to ſay the king himſelf) were more induſtrious (in the opinion of Mr. juſtice Blackſtone)

(*a*) Stat. at large, 7 Hen. IV. cap. 15. (*b*) 8 Hen. VI. cap. 7. 10 Hen. VI. cap. 2.

in

in hunting out proſecutions upon old and forgotten penal laws, for the mean and diſgraceful purpoſe of extorting money from the ſubject, than in framing any new and beneficial regulations. For the diſtinguiſhing character of this reign was, (ſays the learned commentator) that of amaſſing treaſure in the king's coffers, by every means that could be deviſed: and almoſt every alteration in the laws, however ſalutary or otherwiſe in their future conſequences, had this and this only for their great and immediate object. Com. 4 v. 429. The capacity of Henry was excellent, but in ſome degree contracted by the narrowneſs of his heart. Avarice was his ruling paſſion; and he remains an inſtance, almoſt ſingular, of a man, placed in an high ſtation, and poſſeſſed of talents for great affairs, in whom that paſſion predominated above ambition. Though the opinion which Mr. juſtice Blackſtone entertains, may probably be right, yet, it is but proper to remark, that Henry is celebrated by his hiſtorian for many good laws, which he cauſed to be enacted for the government of his ſubjects. It muſt be confeſſed that ſeveral conſiderable regulations, are found among the ſtatutes of this reign, as well with reſpect to the police, as the commerce of the kingdom. To gratify the inſatiable avarice of Henry, "the court of ſtar-"chamber (continues the commentator) was new modelled, and "armed with powers, the moſt dangerous and unconſtitutional, "over the perſons and properties of the ſubject." Id. ibid. It is true, that early in the reign of Henry, the authority of the ſtar-chamber, was in ſome caſes confirmed by act of parliament. Vide Rot. Parl. 3 H. 7. n. 17.—Lord Bacon extols the uſe of this court; but men began, during the age of that hiſtorian, to feel that ſo arbitrary a juriſdiction was totally incompatible with liberty; and in proportion as the ſpirit of independance roſe ſtill higher in the nation, the averſion againſt it increaſed, till it was intirely aboliſhed by act of parliament in the reign of Charles the firſt. Mr. juſtice Blackſtone enumerates many other particulars which were allowed and contrived to increaſe the riches of the ſovereign; from whence he infers, that—"there is hardly a "ſtatute in this reign introductive of a new law or modifying "the old, but what either directly or obliquely tended to the "emolument of the exchequer."—Com. 4 v. 429. 430. Let it not be forgotten however, that in this reign, ſuits were given to the poor *in forma pauperis*, as it is called: that is, without the payment of any fees. Vide 11 H. 7. cap. 12.—A good law at all times, eſpecially in that age, when the people laboured under the oppreſſion of the great. But the moſt important law in its conſequences, which was enacted during the reign of Henry, was that by which the nobility and the gentry acquired a power of deſtroying the ancient entails, and of alienating their eſtates.

Vide 4 H. 7. cap. 24. It is true that the practice was introduced in the reign of Edward the fourth; but it was not, properly ſpeaking, law, till the ſtatute of Henry the ſeventh; which, by correcting ſome abuſes which attended that practice, indirectly gave a ſanction to it. By means of this law, combined with the approaching luxury and refinements of the age, the great fortunes of the barons were gradually diſſipated, and the property of the commons increaſed. It is probable, that Henry foreſaw and intended this conſequence; becauſe the conſtant ſcheme of his policy conſiſted in depreſſing the great, and exalting thoſe who were more dependant on him.—One great check to induſtry in England was the erecting of corporations; an abuſe which is not yet entirely corrected. A law was enacted, that corporations ſhould not paſs any bye-laws, without the conſent of three of the chief officers of ſtate. Vide 19 H. 7. cap. 7.—And to the praiſe of this prince, it may be obſerved, that ſometimes, in order to promote commerce, he lent to merchants ſums of money, without intereſt; when he knew, that their ſtock was not ſufficient for thoſe enterprizes, which they had in view. Polyd. Virg. Hume.

CHAP.

CHAP. IX.

Concerning the ſettling of the common law of England *in* Ireland *and* Wales: *and ſome obſervations touching the iſles of* Man, Jerſey *and* Guernſey, *&c.*

THE kingdom (*a*) of Ireland being conquered by Henry II. about the year 1171 (*b*). He, in his great council at Oxon, conſtituted his younger ſon, John, KING thereof; who proſecuted that conqueſt ſo fully, that he introduced the Engliſh laws into that kingdom, and ſwore all the great men there to the obſervation of the ſame; which laws were, after the deceaſe of king John, again reinforced by the writ of king Henry III. reciting that of king John. Rot. Clauſ. 10 Hen. III. Memb. 8. & 10. Vide infra, & Pryn. 252, 253, &c.

And becauſe the laws of England were not ſo ſuddenly known there, writs from time to time iſſued from hence, containing divers capitula legum Angliæ, and commanding their obſervation in Ireland; as Rot. Parl. 11 Hen. III.

(*a*) It was only entitled the dominion, or lordſhip, of Ireland, (ſtat. Hiberniæ 14 Hen. III.) and the king's ſtile was no other than *dominus Hiberniæ*, lord of Ireland, till the thirty-third year of king Henry VIII. when he aſſumed the title of king, which is recognized by act of parliament. 35 Hen. VIII. cap. 3.—Ireland is ſtill a diſtinct, though a dependant ſubordinate kingdom. As to the deduction and change of the king's title in reſpect to Ireland, ſee Seld. tit. Hon. b. 1. c. 4. ſ. 2.

(*b*) Notwithſtanding what hath been ſaid by many hiſtorians of the total ſubmiſſion of Ireland to Henry II. ſir John Davis very properly obſerves, that this ſuppoſed conqueſt did not extend much further than the neighbourhood of Dublin.—With what propriety can that be called a conqueſt, where the conqueror cannot enforce his own laws and regulations?—It was by very ſlow degrees only that the Iriſh were civilized and brought to a ſtate of ſubmiſſion. Bar. Obſ. on ſtat. 141. The inhabitants of Ireland are, for the moſt part, deſcended from the Engliſh, who planted it as a kind of colony, after the conqueſt of it by Henry II; and the laws of England were then received and ſworn to by the Iriſh nation, aſſembled at the council of Liſmore. Pryn. on 4 Inſt. 249.—And as Ireland, thus conquered, planted, and governed, ſtill continues in a ſtate of dependence, it muſt neceſſarily conform to, and be obliged by, ſuch laws as the ſuperior ſtate thinks proper to preſcribe. Blac. Com. 1 v. 100.

—the

—the law concerning tenancy by curteſy; Rot. Clauſ. 20 Hen. III. Memb. 3. Dorſo.—The law concerning the preference of the ſon born after marriage, to the ſon born of the ſame woman before marriage; or Baſtard eigne & mulier puiſne;—Rot. Clauſ. 20 Hen. III. Memb. 4. in Dorſo: ſo the law concerning all the parceners inheriting without doing homage, and ſeveral tranſmiſſions of the like nature.

For though king Henry II. had done as much to introduce the Engliſh laws there, as the nature of the inhabitants, or the circumſtances of the times would permit; yet partly for want of ſheriffs, that kingdom being then not divided into counties, and partly by reaſon of the inſtability of the Iriſh, he could not fully effect his deſign: and therefore, king John, to ſupply thoſe defects, as far as he was able, divided Leinſter and Munſter into the ſeveral counties of Dublin, Kildare, Meath, Uriel, Catherlogh, Kilkenny, Wexford, Waterford, Cork, Limerick, Tiperary, and Kerry; and appointed ſheriffs and other officers to govern them after the manner of England; and likewiſe cauſed an abſtract of the Engliſh laws under his great ſeal to be tranſmitted thither, and depoſited in the exchequer at Dublin: and ſoon after, in an Iriſh parliament, by a general conſent, and at the inſtance of the Iriſh, he ordained,—that the Engliſh laws and cuſtoms ſhould thenceforth be obſerved in Ireland; and in order to it, he ſent his judges thither, and erected courts of judicature at Dublin. *

But notwithſtanding theſe precautions of king John, yet for that the brehon law, (c) and other Iriſh cuſtoms, gave more of power to the great men, and yet did not reſtrain the common people to ſo ſtrict and regular a diſcipline as the laws of England did; therefore the very Engliſh themſelves,

* Some have entertained an opinion that the laws of England were early introduced into Ireland, by Henry II. long prior to the charter of John. See Matt. Par. ad. ann. 1172. Vit. Hen. II. Molyn. caſe of Irel. 24.—War. Antiq. Irel.—Lel. Hiſt. Irel. 76. and Vaugh. 293. and ſee 4 Inſt. 349.

(c) A law, or cuſtom, by which the Iriſh were governed at the time of the conqueſt by Henry II.—and it ſhould ſeem to be ſo ſtiled from the Iriſh name of judges, who were called brehons. Vide 4 Inſt. 358.—Edm. Spenſer's State of Ireland, p. 1513, edit. Hughes.

ſelves became corrupted by them; and the Engliſh laws ſoon became of little uſe or eſteem, and were looked upon by the Iriſh and the degenerate Engliſh as a yoke of bondage; ſo that king Henry III. was oftentimes neceſſitated to revive them, and by ſeveral ſucceſſive writs to enjoin the obſervation of them. (*d*) And in the eleventh year of his reign, he ſent the following writ, viz.

" Henrici rex, &c. Baronibus Militibus & aliis liberi " tenentibus lageniæ, ſalutem, &c. ſatis ut credimus veſtra " audivit diſcretio, quod cum bonæ memoriæ Johannes, " quondam rex Angliæ pater noſter venit in Hiberniam, " ipſe duxit ſecum viros diſcretos & legis peritos, quorum " communi conſilio, & ad inſtantiam Hibernienſium ſtatuit " & præcepit leges Anglicanas teneri in Hibernia, ita quod " leges eaſdem in ſcriptis readactas reliquit ſub ſigillo ſuo ad " ſcaccar. Dublin. Cum igitur conſuetudo & lex Angliæ " fuerit, quod ſi aliquis deſponſaverit aliquam mulierem; " ſive viduam ſive aliam hæreditatem habentem, & ipſe " poſtmodum ex ea prolem ſuſcitaverit, cujus clamor au- " ditus fuerit infra quatuor parietes idem vir ſi ſupervixerit

(*d*) Henry III. (A. R. 30. 1 Rym. Fued. 442) and Edward I. (A. R. 5. 3 Pryn. Rec. 1218.) were neceſſitated to renew the injunction of John. Notwithſtanding which, the Iriſh ſtill adhered to the brehon law. At a ſubſequent period, however—i. e. 40 Edw. III. The brehon law was aboliſhed, under the idea of its being "a lewd cuſtom, crept in of later times."—Spenſer, ſpeaking of this law, deſcribes it to have been "a rule of right unwritten, but delivered by tradition from one to another, in which oftentimes there appeared great ſhew of equity in determining the right between party and party, but in many things repugnant quite both to God's law and man's." Spenſ. ibid. Though this abolition of the brehon law was in form effected by means of a ſtatute made at Kilkenny, whilſt the duke of Clarence was lord deputy, yet it is moſt certain, that the act was never carried into execution beyond the Engliſh pale, any more than another, made in the time of Henry VII. by which the uſe of the Iriſh language was forbidden, under certain penalties. The firſt ſtatute, which thoroughly eſtabliſhed the dependence of the Iriſh, was the famous law of ſir Edward Poynings, who was lord deputy of Ireland in the reign of Henry VII. Bar. on ſtat. 143. So much of the Iriſh ſtatutes of 40 Edw. III. as relates to the abolition of the brehon law, is in Dav. on Ireland, p. 28. of the folio edition. See alſo Harris's edition of Ware's Antiq. of Ireland, 69.

ipſam

" ipſam uxorem ſuam, habebit tota vita ſua cuſtodiam " hæreditatis uxoris ſuæ, licet ea forte habuerit hæredem " de primo viro ſuo qui fuerit Plenæ ætatis vobis manda- " mus injungentes quatenus in loquela quæ eſt in curia " Willi, Com. Mareſc. inter Mauritium Fitz Gerald " Petent. & Galfridum de mariſco juſticiarium noſtrum " Hiberniæ tenentem, vel in alia loquela quæ fuerit in caſu " prædicto nullo modo juſtitiam in contrar' facere præſu- " matis.

Teſte rege apud. Weſtm. 10 Decemb.
Anno 11° regni noſtri. (e)"

And note, in the ſame year another writ was ſent to the lord juſtice, commanding him to aid the epiſcopal excommunications in Ireland with the ſecular arm, as in England was uſed.

And about this time, Hubert de Burgo, the chief juſtice of England, and earl of Kent, was made earl of Connaught, and lord juſtice of Ireland during life; and becauſe he could not perſonally attend, he on March the 10th, 1227, appointed Richard de Burgo, to be his deputy, or lord juſtice, to whom the king ſent the following writ:

" Rex dilecto & fideli ſuo Richardo de Burgo juſticiario " ſuo Hiberniæ ſalutem. Mandamus vobis firmiter præ- " cipientes, quatenus certo die & loco faciatis venire coram " vobis, archiepiſcopos, epiſcopos, abbates, priores, comites " & barones, Milites & libere tenentes & ballivos ſingulo- " rum comitatuum, & coram eis publice legi faciatis " chartam domini Johannis regis patris noſtri cui ſigillum " ſuum appenſum eſt, quam fieri fecit, & jurari a magna- " tibus Hiberniæ de legibus & conſuetudinibus Anglorum " obſervandis in Hibernia, & præcipiatis eis ex parte noſtra, " quod leges illas & conſuetudines in charta prædicta con- " tentas de cetero firmiter teneant & obſervent. Et hoc " idem per ſingulos comitatus Hiberniæ clamari faciatis, " & teneri prohibentes firmiter ex parte noſtra & forisfac- " turam noſtram, ne quis contra hoc mandatum noſtrum,

(e) Vide Glan. l. 7. c. 18. 7 Co. 22. b. Calvin's caſe. Co. P. 60. Rot. Clauſ. 11 Hen. III. Lit. 141. b. Wright's ten. 193.

" venire

" venire præſumat. Eo excepto quod nec de morte nec " de catallis Hibernenſium occiſorum nihil ſtatuatur ex " parte noſtra citra quindecim dies a Sancti Michaelis, anno " regni noſtri 12°. Super quo reſpectum dedimus Magnat. " noſtri de Hib. uſque ad terminum prædict' teſte meipſo " apud Weſtm. 8° die Maii, anno regni noſtri 12°."

And about the 20th year of Henry III. ſeveral writs were ſent into Ireland; eſpecially directing ſeveral ſtatutes which had been made in England, to be put in uſe, and to be obſerved in Ireland; as the ſtatute of Merton in the caſe of baſtardy, &c.

But yet it ſeems by the frequent grants that were made afterwards to particular native Iriſh men, quod legibus utantur Anglicanis, that the native Iriſh had not the full privilege of the Engliſh laws, in relation at leaſt to the liberties of Engliſh men, till about the third of Edward III. Vide Rot. Clauſ. 2 E. 3. Memb. 17.

As the common law of England was thus by king John and Henry III. introduced into Ireland, ſo in the tenth of Henry VII. ALL THE PRECEDENT STATUTES OF ENGLAND WERE THERE SETTLED BY THE PARLIAMENT OF IRELAND. 'Tis true, many ancient Iriſh cuſtoms continued in Ireland, and do continue there even unto this day; but ſuch as are contrary to the laws of England are diſallowed. Vide Davis's reports, 28. b. the caſe of Taniſtry. [A]

As touching Wales, that was not always the feudal territory of the kingdom of England; but having been long governed by a prince of their own, there were very many laws and cuſtoms uſed in Wales, utterly ſtrange to the laws of England; the principal whereof they attribute to their king, Howell Dha.

After king Edward I. had ſubdued Wales, and brought it immediately under his dominion; he firſt made a ſtrict inquiſition touching the Welſh laws within their ſeveral commotes and ſeigniores, which inquiſitions are yet of record: after which, in the 12th of Edward I. the ſtatute of Rutland was made, whereby the adminiſtration of juſtice in Wales was ſettled in a method very near to the rule of the

the law of England. The preamble of the ſaid ſtatute is notable, viz.

" Edvardus Dei gratia rex Angliæ dominus Hiberniæ &
" dux Acquitaniæ omnibus fidelibas ſuis de terra ſua de
" Snodon & de aliis terris ſuis in Wallia ſalutem in Domino.
" Divina Providentia quæ in ſua diſpoſitione non fallitur,
" inter alia ſuæ diſpenſationis munera, quibus nos & reg-
" num noſtrum Angliæ decorari dignata eſt, terram Walliæ
" cum incolis ſuis prius nobis juri feodali ſubjectam, tam
" ſui gratia in proprietatis noſtræ dominium, obſtaculis qui-
" buſcunque ceſſantibus, totaliter & cum integritate con-
" vertit, & coroniæ regni prædicti tantum partem corporis
" ejuſdem annexuit & univit. Nos, &c.

According to the method in that ſtatute preſcribed, has the method of juſtice been hitherto adminiſtred in Wales, with ſuch alterations and additions therein as have been made by the ſevera ſubſequent ſtatutes of 27 and 34 H. VIII. &c. [B]

Touching the iſle of Man. This was ſometimes parcel of the kingdom of Norway, and governed by particular laws and cuſtoms of their own; though many of them hold proportion, or bear ſome analogy, to the laws of England, and probably were at firſt and originally derived from hence; ſeeing the kingdom of Norway, as well as the iſle of Man, have anciently been in ſubjection to the crown of England. Vide Legis Willi. primi, in Lambard's Saxon Laws. [C].

Berwick was ſometimes parcel of Scotland, but was won by conqueſt by king Edward I. and after that loſt by king Edward II. and afterwards regained by Edward III. It was governed by the laws of Scotland, and their own particular cuſtoms, and NOT ACCORDING TO THE RULES OF THE COMMON LAW OF ENGLAND, further than as by cuſtom it is there admitted; as in Liber Parliamenti, 21 Edw. I. in the caſe of Moyne and Bartlemew, pro dote in Berwick; yet now by charter, they ſend burgeſſes to the parliament of England. [D] Vide Rot. Parl. 16 R. II. n. 41, 42.

Touch-

Touching the iſlands of Jerſey, (*f*) Guernſey (*g*), Sark, and Alderney; they were anciently a part of the dutchy of Normandy; and in that right, the kings of England held them till the time of king John; but although king John, as is before ſhewn, was unjuſtly deprived of that dutchy, yet he kept the iſlands; and when, after that, they were by force taken from him, he by the like force regained them, and they have ever ſince continued in the poſſeſſion of the crown of England. [E]

As to their laws, they are not governed by the laws of England, but by the laws and cuſtoms of Normandy. But not as they are at this day; for ſince the actual diviſion and ſeparation of thoſe iſlands from that dutchy, there have been ſeveral new edicts and laws made by the kings of France, which have much altered the old law of Normandy; which edicts and laws bind not in thoſe iſlands, they having been ever ſince king John's time at leaſt under the actual allegiance of England.

And hence it is, that though there be late collections of the laws and cuſtoms of Normandy, as Terrier and ſome others; yet they are not of any authority in thoſe iſlands, for the deciſion of controverſies; as the Grand Contumier of Normandy (*b*) is, which is, at leaſt in the greateſt part thereof, a collection of the laws of Normandy as they ſtood before the disjoining of thoſe iſlands from the dutchy; viz. before the time of king Henry III. though there be in that collection ſome edicts of the kings of France which were made after that disjunction; and thoſe laws, as I have ſhewn before, though in ſome things they agree with the laws of England, yet in many things they differ, and in ſome are abſolutely repugnant.

And hence it is, that regularly ſuits ariſing in thoſe iſlands, are NOT to be tried, or determined, in the king's courts in England; but are to be heard, tried, and determined in thoſe iſlands;—either before the ordinary courts

(*f*) Jerſey was anciently termed Gearſey, *olim Cæſarea*. 4 Inſt. 286. Vide alſo Blac. Com. 1 v. 106.

(*g*) Or, Garnſey, *olim Sarvia*. 4 Inſt. 286.

(*b*) An ancient book of very great authority.

of

of jurats there, or by the juſtices itinerant there (*i*), commiſſioned under the great ſeal of England, to determine matters there ariſing; and the reaſon is, becauſe their courſe of proceedings, and their laws, differ from the courſe of proceedings and the laws of England.

And although it be true, that in ancient times, ſince the loſs of Normandy, ſome ſcattering inſtances are, of pleas moved here, touching things done in thoſe iſlands; yet the general ſettled rule has been to remit them to thoſe iſlands, to be tried and determined there by their law; though at this day, the courts at Weſtminſter, hold plea of all TRANSITORY actions, whereſoever they ariſe; for it cannot appear upon the record where they did ariſe.

Mic. 42 E. 2. Rot. 45. coram rege. A great complaint was made by petition, againſt the deputy governor of thoſe iſlands, for divers oppreſſions and wrongs done there: this petition was by the chancellor delivered into the court of B. R. to proceed upon it; whereupon there were pleadings on both ſides; but becauſe it appeared to be for things done and tranſacted IN the ſaid iſlands, judgment was thus given: "Et quia negotiam predict' in curia hic terminari "non poteſt, eo quod juratores inſulæ predict' coram juſ-"titiariis hic venire non poſſunt, nec de jure debent, nec "aliqua negotia infra inſula prædicta emergentia terminari "non debent niſi ſecundum conſuet. inſulæ prædictæ. "Ideo recordum retro traditur cancellario ut inde fiat com-"miſſio domini regis ad negotia prædicta in inſula præ-"dicta audienda & terminanda ſecundum conſuet' inſulæ "prædictæ."

And accordingly 14 Junii, 1565, upon a report from the attorney-general, and advice with the two chief juſtices, a general direction was given by the queen and her council;—that all ſuits between the iſlanders, or wherein one party was an iſlander, for matters ariſing within the iſlands, ſhould be THERE heard and determined (*k*).

(*i*) All cauſes are originally determined by their own officers, the bailiffs and jurats of the iſlands.

(*k*) The king's writ, or proceſs, from the courts of Weſtminſter—(*brevia mandatoria* excepted) is there of no force; but his commiſſion is.—They are not bound by common acts of our parliament, unleſs particularly named. 4 Inſt. 286.

But ſtill this is to be taken with this diſtinction and limitation; viz. that where the ſuit is immediately for the king, there the king, may make his ſuit in any of the courts HERE, eſpecially in the court of king's bench: for inſtance, in a quare impedit brought by the king in B. R. HERE, for a church IN thoſe iſlands; ſo in a quo warranto for liberties there; ſo a demand of redemption of lands ſold by the king's tenant within a year and a day, according to the cuſtom of Normandy; ſo in an information for a riot; or grand contempt againſt a governor deputed by the king. Theſe, and the like ſuits, have been maintained by the king in his court of king's bench HERE; though for matters ariſing WITHIN thoſe iſlands: this appears, Paſchæ 16 Edw. II. coram rege, Rot. 82. Mich. 18 Edw. II. Rot. 123, 124, 125. & Paſ. 1 E. III. Rot. 59.

And for the ſame reaſon it is, that a writ of habeas corpus lies into thoſe iſlands for one impriſoned there; for THE KING MAY DEMAND, AND MUST HAVE AN ACCOUNT OF THE CAUSE, OF ANY OF HIS SUBJECTS LOSS OF LIBERTY; and therefore a return MUST be made of this writ, to give the court an account of the cauſe of impriſonment; for no liberty, whether of a county palatine, or other, holds place againſt thoſe brevia mandatoria; as that great inſtance of puniſhing the biſhop of Durham, for refuſing to execute a writ of habeas corpus out of the king's bench, 33 Edw. I. makes evident.

And as pleas ariſing in the iſlands regularly, ought NOT, in the firſt inſtance, to be deduced into the courts here, except in the king's caſe; ſo neither ought they to be deduced into the king's courts HERE, in the SECOND inſtance; and therefore if a ſentence or judgment be given in the iſlands, the party grieved thereby, may have his appeal TO THE KING AND HIS COUNCIL to reverſe the ſame if there be cauſe (*l*). And this was the courſe of relief in the dutchy of Normandy, viz. by appeal to the duke and his

(*l*) For, if an erroneous judgment be given there, a writ of error lies not here. Jenk. 199. pl. 15. who cites 2 E. III. 25. 11 H. VI. 5. Jenkins, after his report of the caſe, adds—"By all the judges of England, and the king's counſel."

"Nil temere novandum
"Fiat quod prius fieri conſuevit,"

council; and in the ſame manner, it is ſtill obſerved in the caſe of erroneous decrees or ſentences in thoſe iſlands, viz. to appeal to the king and his council.

But the errors in ſuch decrees or ſentences are not examined by writ of error in the king's bench, for theſe reaſons, viz.

Firſt, becauſe the courts there, and thoſe here, go not by the SAME rule, method, or order of law.

And ſecondly, becauſe thoſe iſlands, though they are parcel of the dominion of the crown of England, yet they are not parcel of the realm of England, nor indeed ever were (*m*); but were anciently parcel of the dutchy of Normandy; and are thoſe remains thereof, which the power of the crown and kingdom of France, have not been able to wreſt from the kings of England (*n*).

(*m*) In Calvin's caſe, 7 Co. 21. a. it is ſaid, that theſe iſlands are not parcel of the realm of England. It ſhould ſeem to be meant that they were not ſo originally. Cont. Seld. de Ma. Cl. 4 v. 1351. Acc. App. H. Jer. 440.

(*n*) As to our colonies, or plantations, the ſtudent may conſult the firſt volume of Mr. Juſtice Blackſtone's Commentaries, from page 106 to page 109 from whence he may derive ſufficient information.—See alſo Mr. Lind's "Remarks on the principal acts of the thirteenth parliament of Great Britain"—paſſim; and the authorities there cited and relied on.—If I might take the liberty, I would recommend this book to the diſpaſſionate reader, as a performance ſound, diſcuſſive and ingenious.—As to any foreign dominions which may belong to the perſon of the king by hereditary deſcent—by purchaſe, or other acquiſition, as the territory of Hanover, and his majeſty's other property in Germany—ſuffice it to remark, that ſuch dominions do not in any wiſe appertain to the crown of theſe kingdoms—they are therefore entirely unconnected with the laws of England, and do not communicate with this nation in any reſpect whatſoever. See the act of ſettlement, 12 & 13 W. III. c. 3. and Blac. Com. 1 v. 109.

ADDI-

ADDITIONAL NOTES

TO THE

NINTH CHAPTER.

NOTE [A] p. 189.

MR. juſtice Blackſtone in treating of the countries ſubject to the laws of England, ſays, it is to be obſerved, that though the immemorial cuſtoms, or common law of England, were made the rule of juſtice in Ireland, yet no acts of the Engliſh parliament, ſince the twelfth of king John, extended into that kingdom; unleſs ſpecially named, or included under general words, ſuch as, "within any of the king's dominions." This is particularly expreſſed, and the reaſon given in the year books: (*a*) "a tax granted by the parliament of England ſhall not bind "thoſe of Ireland, becauſe they are not ſummoned to our par-"liament:" and again, "Ireland hath a parliament of it's own, "and maketh and altereth laws; and our ſtatutes do not bind "them, becauſe they do not ſend knights to our parliament: "but their perſons are the king's ſubjects, like as the inhabit-"ants of Calais, Gaſcoigny and Guienne, while they continu-"ed under the king's ſubjection." The general run of laws, enacted by the ſuperior ſtate, are ſuppoſed to be calculated for it's own internal government, and do not extend to it's diſtant dependent countries; which, bearing no part in the legiſlature, are not therefore in it's ordinary and daily contemplation. But, when the ſovereign legiſlative power ſees it neceſſary to extend it's care to any of it's ſubordinate dominions, and mentions them expreſly by name, or includes them under general words, there can be no doubt but THEN they are bound by it's laws. (*b*) Blac. Com. 1 v. 101.

Henry the ſeventh, having ſufficiently ſilenced all oppoſition in Ireland, took every politic advantage of the precarious ſituation, into which the Iriſh were reduced; to prevent them therefore from paſſing laws there *rege inconſulto*, and to make ſuch an alte-

(*a*) 20 Hen. VI. 8. 2 Ric. III. 12.

(*b*) Year-book 1 Hen. VII. 3, 7 Rep. 22. Calvin's caſe.

ration in their legiſlature, as would throw the principal weight into the hands of him and his ſucceſſors, he was particularly anxious to effect the paſſing, and which was afterwards accordingly done, of thoſe laws, which have ever ſince been known by the denomination of Poyning's law.

The original method of paſſing ſtatutes in Ireland was nearly the ſame as in England; the chief governor holding parliaments annually, or, as Blackſtone conceives, at his pleaſure, which enacted ſuch laws as they thought proper. (*c*) But an ill uſe being made of this liberty, a ſet of ſtatutes were there enacted in the 10 Henry VII. (ſir Edward Poynings being then lord deputy, whence they are called Poyning's law) one of which, (*d*) in order to reſtrain the power as well of the deputy as the Iriſh parliament, provides, firſt, that, before any parliament be ſummoned or holden, the chief governor and council of Ireland ſhall certify to the king under the great ſeal of Ireland the conſiderations and cauſes thereof, and the articles of the acts propoſed to be paſſed therein. Secondly, that, after the king, in his council of England, ſhall have conſidered, approved, or altered the ſaid acts or any of them, and certified them back under the great ſeal of England, and ſhall have given licence to ſummon and hold a parliament, THEN the ſame ſhall be ſummoned and holden; and therein the ſaid acts ſo certified, and no other, ſhall be propoſed, received or rejected (*e*). But as this precluded any law from being propoſed, but ſuch as were preconceived before the parliament was in being, which occaſioned many inconveniences and made frequent diſſolutions neceſſary, it was provided by the ſtatute of Philip and Mary before cited, that any new propoſitions might be certified to England in the uſual forms, even after the ſummons and during the ſeſſion of parliament. By this means however there was nothing left to the parliament in Ireland, but a bare negative or power of rejecting, not of propoſing or altering, any law. It was now clear that neither the lords nor the commons in Ireland had a right to frame or to propoſe bills to the crown, but they muſt firſt be framed in the privy council of Ireland, be afterwards conſented to, or altered by the king, and council in England; and then, appearing in the form of bills, be refuſed, or accepted *in toto* by the lords and commons of Ireland. Mr. juſtice Blackſtone ſays, that the uſage now is, that bills are often framed in either houſe, under the denomination "of heads for a bill or bills:" and in that ſhape they are offered to the conſideration of the lord lieutenant and privy coun-

(*c*) Iriſh Stat. 11 Eliz. ſt. 3. c. 8.

(*d*) Cap. 4. expounded by 3 & 4 Ph. & M. c. 4.

(*e*) 4 Inſt. 353.

cil;

cil: who, upon ſuch parliamentary intimation, or otherwiſe upon the application of private perſons, receive and tranſmit ſuch heads, or reject them without any tranſmiſſion to England. And, with regard to Poynings law in particular, it cannot be repealed or ſuſpended, unleſs the bill for that purpoſe, before it be certified to England, be approved by both the houſes. *(f)*

It is true, that as well the lords as the commons, in Ireland, have attempted, and ſhould ſeem to have gained an approach towards their ancient right of beginning bills; this has been done not in that name, but under the nomination of "HEADS of bills," to be tranſmitted by the council; who, as they frame the acts, have aſſumed the power of modelling THESE alſo. Thus reſtrained Ireland exhibits a legiſlature, of peculiar complication. Firſt, the privy council of Ireland, who, though they may receive the hint from the lords or the commons, frame the bill;—next, the king and the council of England, who having the power of alteration, really make it a bill, UNALTERABLE, by ſending it under the great ſeal of England;—then, the two houſes of lords and commons in Ireland, muſt agree in, or reject, the whole:—if it paſſes all theſe, it is preſented to the king for his aſſent, which, as it was before obtained, can only in this ſtage of the proceſs, be nominal.

But the Iriſh nation, being excluded from the benefit of the Engliſh ſtatutes, were deprived of many good and profitable laws, made for the improvement of the common law: and, the meaſure of juſtice in both kingdoms becoming thereby no longer uniform, therefore it was enacted by another of Poyning's laws, *(g)* that all acts of parliament, before made in England, ſhould be of force within the realm of Ireland. *(h)* But, by the ſame rule that no laws made in England, between king John's time and Poyning's law, were then binding in Ireland, it follows that no acts of the Engliſh parliament made ſince the 10th Henry VII. do now bind the people of Ireland, unleſs ſpecially named or included under general words. *(i)* And on the other hand it is equally clear, that where Ireland is particularly named, or is included under general words, they are bound by ſuch acts of parliament. For this follows from the very nature and conſtitution of a dependent ſtate: dependence being very little elſe, but an obligation to conform to the will or law of that ſuperior perſon or ſtate, upon which the inferior depends. The original and true ground of this ſuperiority, in the preſent caſe, is what we uſually call, though ſomewhat improperly, the right of

(f) Iriſh Stat. 11 Eliz. ſt. 3. c. 38.
(g) Cap. 22.
(h) 4 Inſt. 351.
(i) 12 Rep. 112.

conqueſt: a right allowed by the law of nations, if not by that of nature; but which in reaſon and civil policy can mean nothing more, than that, in order to put an end to hoſtilities, a compact is either expreſly or tacitly made between the conqueror and the conquered, that if they will acknowledge the victor for their maſter, he will treat them for the future as ſubjects, and not as enemies. (*k*)

But this ſtate of dependence being almoſt forgotten, and ready to be diſputed by the Iriſh nation, it became neceſſary ſome years ago to declare how that matter really ſtood: and therefore by ſtatute 6 Geo. I. c. 5. it is declared, that the kingdom of Ireland ought to be ſubordinate to, and dependent upon, the imperial crown of Great Britain, as being inſeparably united thereto; and that the king's majeſty, with the conſent of the lords and commons of Great Britain in parliament, hath power to make laws to bind the people of Ireland.

Thus (continues the judicious commentator) we ſee how extenſively the laws of Ireland communicate with thoſe of England: and indeed ſuch communication is highly neceſſary, as the ultimate reſort from the courts of juſtice in Ireland is, as in Wales, to thoſe in England; a writ of error (in the nature of an appeal) lying from the king's-bench in Ireland to the king's-bench in England, (*l*) as the appeal from the chancery in Ireland lies immediately to the houſe of lords here: it being expreſly declared, by the ſame ſtatute 6 Geo. 1. c. 5. that the peers of Ireland have no juriſdiction to affirm or reverſe any judgments or decrees whatſoever. The propriety, and even neceſſity, in all inferior dominions, of this conſtitution, "that, though juſtice be in general adminiſtered by courts of their own, yet that the appeal in the laſt reſort ought to be to the courts of the ſuperior ſtate," is founded upon theſe two reaſons. Firſt, becauſe otherwiſe the law appointed or permitted to ſuch inferior dominion, might be inſenſibly changed within itſelf, without the aſſent of the ſuperior. Secondly, becauſe otherwiſe judgments might be given to the diſadvantage or diminution of the ſuperiority; or to make the dependence to be only of the perſon of the king, and not of the crown of England. (*m*) Vide Blac. Com. 1 v. 102, 103, 104. Sulliv. Lect. 209, 218, 221, 222.

(*k*) Puff. L. of N. l. 8. c. 6. ſ. 24—and l. 7. c. 7. ſ. 3, 4.—and ſee Grot. l. 3. c. 8. and 15.

(*l*) This was law in the time of Henry VIII.; as appears by the ancient book, entitled, Diverſity of courts, c. bank le roy.

(*m*) Vaugh. 402.

NOTE

NOTE [B] p. 190.

Though Wales, unconquered and uncultivated, for ages preſerved its independence againſt the continued attempts of a great and of a powerful people, to ſubject it; yet whether this may with greater propriety be aſcribed to courage, to the ſituation of the country, or to a want of that, whatever it may be, which ſtimulates the ambition of conquerors, is not perhaps ſo eaſy to determine: certain however it is, that the Saxons, inſtigated more by revenge, than by any ſolid advantage which could poſſibly have been derived from the conqueſt of ſuch a country, continually exerted every effort to ſubdue it.

At what period the Britons were firſt called WELSH, or from whence the word *Wallia* is derived, is not, I believe, as yet aſcertained: laborious may have been the reſearches, various, no doubt, are the conjectures. From whatever origin the word may have been derived, it is not, however, unreaſonable to ſuppoſe that it was at firſt a term of reproach applied by the Saxons, the Welſh having almoſt invariably denominated themſelves Cymry.

Mr. juſtice Blackſtone, ſpeaking of the Welſh, remarks, that when the Saxons themſelves were converted to chriſtianity, and ſettled into regular and potent governments, the retreat of the antient Britons grew every day narrower; that, they were overrun by little and little, gradually driven from one faſtneſs to another, and by repeated loſſes abridged of their wild independence. (*a*) Of this there may be no queſtion, a minute detail, therefore, of their reciprocal depredations from the æra of the Saxon conqueſt, to that of Edward the firſt, would be of very little, if of any conſequence; in truth their wars were equally ſavage and ferocious; each, as the ſcale of fortune preponderated, exhibiting maſſacre and devaſtation, fire and the ſword. "Very early, "(adds Mr. juſtice Blackſtone) in our hiſtory, we find their "princes doing homage to the crown of England, till at length "in the reign of Edward the firſt, who may juſtly be ſtiled the "conqueror of Wales, the line of their ancient princes was "aboliſhed, and the king of England's eldeſt ſon became, as A "MATTER OF COURSE, their titular prince." (*b*) If this aſſertion be but a little inveſtigated, it may, perhaps, in the end, a little be doubted. Under the conduct of Llewellyn ap Jorweth, and his ſon and ſucceſſor David ap Llewellyn, the Welſh carried on a war with various ſucceſs againſt the Engliſh; Llewellyn ap Gryffidd, who ſucceeded his uncle, David ap Llewellyn, was the

(*a*) Com. 1 v. oct. 93. (*b*) Com. 1 v. oct. 94.

laſt prince of Wales of the Britiſh blood; and it is in general admitted, that by the death, or, as ſome ſuggeſt, by the aſſaſſination of this prince, the Welſh were at length, not totally, though in a great meaſure, conquered by Edward the firſt; for it is probable that this conqueſt extended not to any other counties than thoſe which are ſpecified in the ſtatute of Wales (*c*) viz. Merioneth, Carnarvon, Angleſey and Flintſhire, and the counties of Carmarthen and Cardigan in South-Wales; in which counties only, Edward erected caſtles. (*d*) With Llewellyn expired the diſtinction of his nation, and though foreign conqueſts might add to the glory, yet this added to the felicity of England. To incorporate the victors with the vanquiſhed, Edward granted lands in Wales to his followers; to prevene ſecurity and concealment, he deſtroyed the woods, which had ſo often afforded ſafety to the enemy; and, the more effectually to ſubjugate the country, caſtles were erected, which he took eſpecial care ſufficiently to garriſon: however lenient or however politic the conduct, yet ſurely it muſt have been accompanied with ſome degree of ſeverity, or the brave Llewellyn would not ſo feelingly have complained —— "Nam nos adeó ſpoliati eramus (ſays "Llewellyn) immó in ſervitutem redacti per juſticiarios & balli"vos regis, amplius quam ſi Saraceni eſſemus, vel Judei denun"ciavimus domino regi, ſed ſemper mittebantur juſticiarii "et ballivi ferociores, et crudeliores et quando illi ſaturati erant "per injuſtas exactiones, alii de novo mittebantur ad populum "exorciandum, in tantum quod Wallenſis malebat mori, quam "vivere." (*e*) Thus woefully experiencing the cruelty and the rapacity of the Engliſh, the Welſh, however reduced, were unwilling peaceably to ſubmit to the power of Edward, and therefore boldly inſiſted on being governed by a prince of their own country. To effect this purpoſe Edward diſpatched his queen, when pregnant, to Carnarvon caſtle, where ſhe was delivered of a ſon, (*f*) who in conſequence was honoured with the title of prince of Wales. By this politic condeſcenſion, Edward complied with the literal import of the requeſt, but at the ſame time avoided the ſpirit and the intention of it. Thus the territory of Wales (as Mr. juſtice Blackſtone conceives) (*g*) became entirely re-annexed, by a kind of feodal reſumption, to the dominion of the crown of England, (*h*) or, as the ſtatute of Rhudhlan (*i*)

(*c*) Statutum Walliæ—12 Edw. I. Vide Appendix to Ruff. Stat. p. 3.

(*d*) Bar. Ob. Stat. 104.

(*e*) Appendix to Wynne's Hiſt. of Wales.—Bar. Ob. Stat. 324.

(*f*) Edward II.

(*g*) Com. 1 vol. oct. 94.

(*h*) Vaugh. 400.

(*i*) 10 Edw. I. Roteland, or more properly Rhudd-lan, or Rhydland.

ex-

expreſſes it—" terra Walliæ cum incolis ſuis, prius regi *jure feodali* " *ſubjecta*, (of which homage was the ſign) jam in proprietatis " dominium totaliter et cum integritate converſa eſt, et corone " regni Angliæ tanquam pars corporis ejuſdem annexa et unita." The expreſſion *jure feodali ſubjecta*, is ſomewhat remarkable, as it is believed, (*k*) that no inſtance can be found of a *jus feodale* prevailing IN ENGLAND; we hear indeed of the word *feodum*, and the diſtinction between the *feodum novum*, and the *feodum antiquum*, but of a REGULAR SYSTEM of feodal law, which this expreſſion ſeems to indicate, there are but very ſlight traces. Edward however was a conqueror, and had a right to make uſe of his own words in the preamble to his own law.

It may not be impertinent to obſerve that though of late years ſome very ingenious attempts have been made to explain our antient common law, by feodal principles, yet it is evident that neither Littleton nor his learned and laborious commentator, ſeem to have known that ſuch a law had ever had any prevalence in any part of Europe. The more effectually to blend the vanquiſhed with their conquerors, Edward was not only deſirous of having the laws of Wales reviewed, but of having them compared and if poſſible rendered conſonant with thoſe of England; and to accompliſh ſo noble a regulation he directed proper enquiries to be made before certain commiſſioners, over whom the biſhop of St. Davids, was appointed to preſide. The certificates and the returns of theſe commiſſioners are printed in the appendix to the laws of Hoel Dha, or the good, the legiſlator (*l*) of the Britons, and contain many curious particulars. (*m*) It was, with truth, conceived, that the cuſtom of gavelkind, had in a violent degree promoted public and hereditary feuds; ſovereignties as well as private property being, by the cuſtom of Wales, diviſible among all the male iſſue, whether legitimate or not.

Some have thought that the equal partition of private eſtates, among the male iſſue, tends not only to the promotion of agriculture but to the increaſe of the people; and that in a government founded on equality and liberty, it is the medium, which curtails the wealth and the power of individuals. Others conceive that the cuſtom of lands deſcending to the youngeſt ſon, which we term borough-engliſh, in preference to the other

(*k*) Obſ. on Stat. 107.

(*l*) The prince of Wales, without queſtion, had legiſlative authority; he could, ad libitum, alter, abrogate, and enact laws; yet in the exerciſe of this extenſive power, whether delegated or aſſumed, it became him to act in ſtrict conformity with the public good; for the diſapprobation of the ancient Britons was ſhewn not by ineffectual petitions, but by the ſword—when the ſovereign ceaſed to be deſerving, he ceaſed to be a prince.

(*m*) Bar. Obſ. on Stat. 105.

ſons,

ſons, has a more rational foundation than the excluſive deſcendibility to the eldeſt; he being ſuppoſed, and not very unreaſonably, more capable of maintaining himſelf than the youngeſt; who might probably be of ſuch tender years, as to be altogether unable to provide for himſelf on the deceaſe of his anceſtor. In conſequence of the enquiries which Edward had directed to be made, the cuſtom of gavelkind, notwithſtanding the diſtraction which was the reſult of its exiſtence, with ſome other cuſtoms which had long been prevalent in Wales, was retained, others indeed were altered, and ſome were aboliſhed, by the ſtatute of Wales, which was made in the 12th year of the reign of Edward the firſt, A. D. 1284. This ſtatute bears date, "apud Rothela-"num (now called Rhydland in Flintſhire) die Dominica in "medio quadrageſimæ anno regni noſtri duodecimo:" Barrington (n) obſerves on this ſtatute that, it is certainly no more than regulations made by the king in council, for the government of Wales, which, if the preamble is to be credited, was now totally ſubdued. This law, though it has been but little attended to, either by lawyers or by hiſtorians, merits particular notice, becauſe it not only makes known what were then the laws and the cuſtoms of Wales, but, by its remedial injunctions, diſcovers likewiſe what at that time was the law of England.—— By this ſtatute many material alterations were made in many parts of their laws, ſo as to reduce them nearer to the ſtandard of the Engliſh, eſpecially in the forms of their judicial proceedings: but they ſtill retained very much of their original polity, and in particular their rule of inheritance, (o) for their cuſtom of gavelkind was continued till the time of Henry the eighth. Notwithſtanding theſe ſeemingly good intentions of Edward, many of the Welſh, from the deſire of plunder, (p) or from a rooted antipathy againſt their conquerors, were ſtill inclined to diſorder; and under the conduct of Owen Glyndowr, emboldened by a confederacy with the potent earls of Worceſter and Northumberland, their untractable ſpirit broke forth in inſurrection. Henry the fourth, however, had the good fortune to defeat ſo formidable a combination, and by the deciſive battle of Huſke put an end to the aſpiring hopes of Owen. This was the laſt ſtruggle which the Welſh made for the recovery of their liberties; and the Engliſh now having entirely ſubjected them, treated them rather as ſlaves than as ſubjects. Subſequent to the ſtatute of Wales and anterior to this ſubjugation by Henry, their provincial immunities had been from time to time abridged; but now, by an ill-judged ſeverity, they were prohibited from the enjoyment of any offices, and from the

(n) Obſ. on Stat. 104. (o) Blac. Com. 1 vol. oct. 94. (p) See Barr. on Stat. 329.

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purchaſing of any lands,——even penal laws were enacted to prevent the Engliſh from intermarrying with the Welſh. (q) Thus inſtead of healing the wounds occaſioned by inſurrection, was the breach which ſubſiſted between the two nations, extended. However, in the reign of Henry the VII. who was deſcended from the princes of North-Wales, the Welſh experienced greater favour; and by his ſon and ſucceſſor Henry VIII. the union of England and Wales was happily and politically effected. Previous ſteps having been taken to introduce a union of laws between the two countries, (r) the finiſhing ſtroke to the independency of the Welſh was, as Dr. Blackſtone remarks, (s) given by the ſtat. 27. Henry VIII. c. 26. which at the ſame time gave the utmoſt advancement to their civil proſperity. The title of it, is "an act concerning laws to be uſed in Wales." (t) By this ſtatute it is enacted, firſt, that the dominion of Wales ſhall be for ever united to the kingdom of England. Secondly, that all Welſhmen born ſhall have the ſame liberties as other the king's ſubjects. Thirdly, that lands in Wales ſhall be inheritable according to the Engliſh tenures and rules of deſcent. Fourthly, that the law of England, and no other, ſhall be uſed in Wales; beſide many other regulations of the police of this principality. The ſtatute 34 and 35 Henry VIII. c. 26. entituled "an act for certain ordinances in the king's dominion and "principality of Wales" (u) confirms the ſame. This act not only adds farther but alſo contains a more complete code of regulations, for the adminiſtration of juſtice; with ſuch preciſion, and ſuch accuracy, that no one clauſe of it, according to Mr. Barrington, (x) hath ever yet occaſioned a doubt, or, required an explanation.

It begins by dividing Wales into twelve ſhires; before, as lord Herbert of Cherbury aſſerts (in his life of Henry VIII.) it conſiſted of one hundred and forty lordſhips marchers, with *jura regalia*, and that the grand object of this ſtatute was to reduce their jarring cuſtoms to uniformity. In ſhort this act reduced Wales into the ſame order in which it at preſent ſtands; differing from the kingdom of England in only a few particulars, (ſuch as having courts within itſelf INDEPENDENT of the proceſs of Weſtminſter-hall) and ſome other immaterial peculiarities hardly more than are to be found in many counties of England itſelf. (y) It hath already been ſaid that this ſtatute is ſo clear, that it

(q) Vide Barr. Obſ. Stat. 324, 329.
(r) Ibid. 457.
(s) Com. 1 vol. oct. 94.
(t) Vide Ruff. Stat. vol. 2. pa. 240.
(u) Id. 348.
(x) Obſ. on Stat. 456.
(y) Blac. Com. 1 vol. oct. 95.

hath

hath not ever required either expoſition or alteration; lord Bacon (z) hath juſt abridged ſome of the regulations, thinking perhaps, that they ſpoke ſufficiently for themſelves; Mr. juſtice Doddridge hath purſued the ſame mode in his account of the principality, without offering any other obſervation than that "the juſtices of the great ſeſſion have the ſame powers with the "antient juſtices in eyre." He could not by this mean that the juſtices in eyre had authority to decide cauſes in a court of equity, which the juſtices of the great ſeſſion have ſo long exerciſed, that it cannot now be diſputed: how they originally obtained this juriſdiction cannot be eaſily aſcertained, as in the 34 and 35 Henry VIII. which enumerates every officer in the courts of law, there is not the leaſt alluſion to any proceedings in equity. (a)

Thus were united a people hitherto diſtracted with continual animoſity, and thus, to uſe the words of the elegant commentator, were this brave people gradually conquered into the enjoyment of true liberty; being inſenſibly put upon the ſame footing and made fellow citizens with their conquerors. (b)

With the greateſt deference to ſuch reſpectable authorities as Mr. juſtice Blackſtone, and Mr. Barrington, the ſtatute of 34 and 35 Henry VIII. cannot NOW be deemed a complete code of regulations for the adminiſtration of juſtice in Wales; in truth, whoever attentively conſiders the mode of judicial proceedings as conducted in Wales, compared with that which is purſued in this kingdom, muſt immediately acknowledge the manifeſt ſuperiority of the latter. It is true that they have in Wales a court which is ſomewhat improperly nominated the court of grand ſeſſions, in which is tranſacted, all profeſſional buſineſs, either at law, or in equity.——It is equally true that in general the learned judge, in the trial of a cauſe, will deliver an elaborate ſpeech to the jury,——all this is true;——but if it is apparent, that the common people are in general ignorant of the Engliſh language——that in Wales, they are not, as I apprehend, permitted to try cauſes by ſpecial juries——that where the cauſe of action exceeds ten pounds, the parties may try it at the next Engliſh county, by which means either the plaintiff or the defendant, is frequently obliged at a great expence, and at great trouble, to bring witneſſes from a very diſtant part, to try a very trifling cauſe, and by ſuch means affording to the opulent too frequent opportunities to harraſs and oppreſs the indigent——it muſt be obvious that what was originally intended as a benefit is now become a grie-

(z) In his Law Tracts. (a) Obſ. on Stat. 459. (b) Blac. Com. 1 vol. oct. 94.

vance

vance——and that as the reaſon (*c*) for trying cauſes in the next Engliſh county has long ſince ceaſed, the practice ſhould ceaſe alſo.——Were the judicial proceedings in every reſpect the ſame as in England, and Wales joined to the Engliſh circuits, there would not then, perhaps, exiſt any partial diſtinction between the inhabitants of England and of Wales——they would then have the ſame laws, the ſame juſtice, the ſame government, and in time the ſame language. It is true that the natives of this country are ſomewhat untractable in their diſpoſitions, and to which it may be attributed that they ſeldom, however deſerving, riſe to eminence in any department;——it may however be the moſt pleaſing reflection to the gentlemen of Wales, that, unplaced and unpenſioned, they are perhaps the only part of the ſtate, who have not had ſome ſhare in the profits of government, and enjoyed ſome part of the public ſpoils. On the whole it is to be hoped by every one who underſtands and, underſtanding, wiſhes to promote the real intereſt of the principality, that every diſtinction, between England and Wales, whether ariſing from a difference of manners and of cuſtoms—from the mode of adminiſtring juſtice, or even from the language itſelf, may be entirely done away.

Lampley and others againſt Thomas and others, B. R. Hilary 21 Geo. II.

This was an action of treſpaſs, to which the defendants pleaded that the county of Glamorgan is one of the twelve counties within the principality or dominion of Wales, within which county there are and time out of mind have been juſtices, and that all and ſingular pleas and actions as well real as perſonal ariſing within the ſame county, are, and at the time of exhibiting the bill of the ſaid L. L. and M. T. were, and for time immemorial have been, and of right ought to be, pleaded and pleadable within the ſaid county of Glamorgan, before the juſtices there for the time being and not here in the court of our ſaid lord the king, before the king himſelf, and that they the ſaid W. T. and others at the time of exhibiting the ſaid bill of the ſaid L. L. and M. T. and before were, and from thenceforth hitherto have been reſident and commorant in the ſame county, that is to ſay, at Reynoldſon in the ſaid county; and this they are ready to verify, as the court here, &c. Wherefore, ſince the cauſe of action aforeſaid aroſe in the ſaid county of Glamorgan, within the principality or dominion of Wales, the aforeſaid W. T. and others, pray judgment if the court of our lord the king here, will, or ought to have farther conuſance of the plea aforeſaid.

(*c*) Which was to procure a more impartial trial; on account of the party factions, which generally prevailed in Wales.

To

To this plea, the plaintiff demurred generally; and the defendant joining in demurrer, the caſe in that form was brought before the court for argument. It was argued ſeveral times by ſome of the ableſt gentlemen in the profeſſion; but the queſtion being a queſtion of moment, and of neceſſity requiring the greateſt care and attention, it ſo happened, that before the court could finally decide, the ſuit ABATED, in conſequence of the death of ſome of the parties litigant. However another action was commenced (*a*) in which the pleadings were exactly ſimilar with thoſe in Lampley and Thomas.

The great queſtion was, whether the court of grand ſeſſions in Wales poſſeſſed a juriſdiction, EXCLUSIVE of that of the court of kings-bench. For, the plaintiff, it was inſiſted, that there could not be a doubt, but that the court of king's-bench had a general juriſdiction over the kingdom of England, inſomuch that if an act of parliament ſhould annex or unite any other country to England, the king's-bench here would (unleſs poſitively excluded) have juriſdiction over it; that by the ſtatutes which unite Wales to England, its juriſdiction is not, by any mode, excluded; and to ſhew that the legiſlature thought it had ſuch a juriſdiction, the ſtatute 4 and 5 W. and M. which impowers it to appoint commiſſioners for taking ſpecial bails, the 1 Ed. 6. c. 10. which requires the attendance of the under ſheriffs of Wales, and the 18 Eliz. for appointing juſtices of aſſiſe in Wales, were referred to.

The courts of chancery and exchequer, it was ſaid, exerciſe juriſdiction in Wales, as having an original juriſdiction; (*b*) and for what reaſon the court, in which the king himſelf is ſuppoſed to be perſonally preſent, ſhould be excluded, they could not conceive, as there exiſted not any known excluſion.

In anſwer to this, though it was admitted on the part of the defendant, that the king's commiſſion, certain mandatory writs, and all judicial proceſs, might iſſue into Wales, yet it was urged that neither a latitat nor any other meſne proceſs could iſſue, from the court of king's bench, into that principality. (*c*) In ſupport of the poſition, it was aſſerted that anterior to the ſtatute 12 Ed. I. called *ſtatut. Walliæ*,—Wales was a dominion of itſelf, governed by its own laws, and not ſubjugated to the laws of England in reſpect to private rights or private wrongs; though when any diſpute aroſe between the prince and the lords marchers, or the biſhops, it was admitted that THEY were accuſtomed to apply to the

(*a*) Jones againſt Jones.
(*b*) Plowden 199. b. Stradling v. Morgan.
(*c*) T. Raym. 206. 3 Keb. 401. 2 Mod. 10. 2 Bulſ. 156. Het. 18. Cro. Jac. 484. Plowd. 127. b.

king's

king's ſuperior courts here, becauſe, the prince of Wales held his dominion (as a feudatory) of the king of England.

Writs of quare impedit, it was confeſſed, had often been brought of churches in Wales, in the king's courts here, (*d*) becauſe the diſpute was between the lords marchers, or between the biſhop and others, and becauſe the princes of, could not write to the biſhops in, Wales. Vaugh. 409.

Though it was granted that ſeveral ſtatutes give particular ſpecific powers to this court which it exerciſes into Wales, yet it was ſtrenuouſly denied, that the power to iſſue meſne proceſs there between ſubject and ſubject, was given by any act of parliament, or warranted by any legal deciſion.

That the debtor of the king is to be conſidered as in his place, and is therefore privileged to ſue in whatever court the king pleaſes, which has uſually been in that of the exchequer; for which reaſon, it ſhould ſeem to have been admitted, that that court alone exerciſed a juriſdiction, which, as now contended, equally belonged to the court of king's-bench.

On the ſecond argument, it was contended for the plaintiff, that Wales was originally part of England; this, it was inſiſted, was evident from the declarations of the kings and of the parliament of England, 12 Ed. I. and 27 Henry VIII. and that therefore it muſt, of neceſſity, follow, that all the king's ſuperior courts originally had juriſdiction in Wales.

The princes of Wales, it was ſaid, were amenable to the parliament of England; that the parliament could not have power to ſummon any one to parliament, who was not a ſubject of England; from whence it was inferred, that Wales was originally part of England.

That Wales might be conſidered in the nature of a county palatine; and it never was diſputed that the counties palatine were parts of England; if (added the counſel) a judgment be given in any court at Weſtminſter, the ſubject has a right to have execution out of that court, into the counties palatine; that the ſuperior courts exerciſe juriſdiction into thoſe counties, becauſe they had exerciſed it prior to their exiſtence; and there is now no doubt (continued they) but the court of king's-bench can iſſue an execution into Wales.

That Wales was part or holden of England, was apparent from the caſe of David, brother to prince Fluellin; for, had it been otherwiſe, David could not, by the law of nations, have been puniſhed as a traitor. 4 Inſt. 239. That the acts of parliament relating to Wales, and for erecting courts there, not

(*d*) 12 Ed. III. c. 2. 34 & 35 Hen. VIII. 27 H. VIII. 1 W. & M. 5 Eliz. c. 23.

having negatived the king's ſuperior courts, had not excluded them; their whole intent being to bring the people of England and of Wales under one and the ſame municipal ſyſtem.

A clauſe in the ſtatute 34 and 35 H. 8. cap. 26. ſect. 115. it was inſiſted put the matter out of doubt: "Item, that all pro-"ceſs for weighty and urgent cauſes ſhall be made and directed "into Wales by the ſpecial commandment of the chancellor of "England, or any of the king's council in England, as hereto-"fore hath been uſed; any thing in this act to the contrary not-"withſtanding;" that this ſhewed it was the intent of the legiſlature to give juriſdiction to the grand ſeſſions for leſs cauſes, and to leave the people if they pleaſed to come here upon weighty points, as they had before done.

That the ſtatute 29 Car. 2. c. 5. gives power to the judges of the courts here to grant commiſſions to take affidavits in Wales, and the 4 and 5 W. and M. the like as to ſpecial bails; what, it was ſaid, can be the uſe of commiſſions to take bail, if meſne and original proceſs will not run there?

That the courts of Weſtminſter-hall exerciſe authority by a power which they have immemorially had; it was admitted that no inſtance could be found, of proceſs into Wales in the time of the princes thereof, except that of David Fluellin; and that there were defects in the juriſdictions of the lords of the marches of Wales, which were not in the principality; for if a queſtion aroſe, touching THEIR boundaries it was uſually determined in the courts here; but that in many caſes of dower where the loyalty of marriage was to be certified by the biſhop, both in the marches and in the principality, the courts here had exerciſed juriſdiction.

That the courts of Weſtminſter were upon an equality in regard to the ſtatutes relative to Wales; and as to the ſubpœna and quo-minus ſent there out of the exchequer, as prerogative writs, and granted to the plaintiff upon the idea of his being the king's debtor; every one knew it to be, in every point of view, a mere fiction. The court of chancery here, it was declared, exerciſes juriſdiction into Wales, notwithſtanding there is a court of equity there, which has a concurrent juriſdiction; there have been, it was urged, inſtances of latitats iſſuing there from this court, and that there could be no doubt but mandatory and judicial writs would run into Wales.

That a tertenant of lands in Wales, who is bound by a judgment in this court, is liable to be ſerved with a *ſcire facias*, yet at the ſame time he is not liable to be ſerved with a latitat of this court, was they thought, ſomewhat unaccountable.

To this, it was obſerved, for the defendant, that this court muſt take notice that there are courts of juſtice in Wales, they being

being noticed in many public ſtatutes; and therefore the plaintiff might have had juſtice there, if he had thought fit.

That, prior to the ſtatute of Rutland, Wales was governed by its own laws with reſpect to private property; but, in all probability, was held *jure feodali*, of the crown of England; that the difference was great and manifeſt between the princes and great men of Wales being ſummoned to the Engliſh parliament, and being cited to appear in this court. That it did not appear by any authority that this court before the ſtatutes of Wales, had any juriſdiction to ſend original proceſs there; from whence it was inferred that it had not ſuch a juriſdiction, and if it had not, that of conſequence it could not be ouſted of an authority which it never had poſſeſſed.

That ſuppoſing this court antiently to have had original juriſdiction in Wales, yet by the ſtatutes made touching it, although there are no expreſs negative words, yet that the intent of the legiſlature to exclude this court was evident from ſeveral parts of thoſe ſtatutes; that the court of king's-bench has a PARTICULAR juriſdiction given to it by the very ſame ſtatute, which erects and directs the court of Wales (*e*).

It was inſiſted that the court of king's-bench, could not poſſibly have, becauſe the court of common pleas had *not*, any original juriſdiction into Wales, neither in real nor in perſonal actions, nor had ever exerciſed any; that there never was any fine or recovery in the C. B. of lands in Wales, nor could any conveyance paſs ſuch a title. In this court, it was ſaid to be quite a new attempt; and that, ſuppoſing the juriſdiction to have ever had exiſtence, it was ſomewhat ſtrange that it had not ever been exerciſed.

The practice of one court in the hall is not, it was ſaid, to be governed by that of another, for that nothing is more certain than that they have different juriſdictions, each by preſcription, and have alſo different rules of practice. That the court of exchequer had for many years exerciſed a juriſdiction, by ſending their firſt proceſs into Wales without any interruption whatever, and that this particular practice of that court, is part of the law of the land.

On the third argument, it was declared, on the part of the plaintiff, that England and Wales were antiently one kingdom, governed by the ſame laws, exerciſing the ſame religion, and uſing the ſame language: to ſupport this aſſertion, 2 Mod. 11. Hales Hiſt. Com. Law, 219. St. of Wales 12 Ed. 1. were relied on. That Wales was holden of the crown of England,

(*e*) 34 and 35 H. 8.

Dodder. 3. was cited; and that, when the Welſh rebelled, they were always treated as rebels and traitors, and not as enemies, 4 Inſt. 239. was adduced as an authority in point. That being forfeited by the treaſon of its prince it veſted in the crown of England; and that the ſtatute 27 H. 8 c. 26. in the preamble, declares it to be a member of the crown, and it might not be improperly ſaid to be in its remitter; (f) from all which it was inferred that this court had original juriſdiction in Wales.

That the eſtabliſhing of courts in Wales gave them a concurrent juriſdiction with this court, which they had not before; and that thoſe courts were erected becauſe the inhabitants were ſo far removed from the metropolis. That ſect. 115. of the 34 and 35 H. 8. c. 26. was the ſtrongeſt proof that this court had original juriſdiction, and in which the words "chancellor and king's council" meant the judges. 43 Aſſiz. 35. Therefore this court had original juriſdiction which the ſtatutes had not taken away, becauſe they contain not any excluſive negation; or if it had not original juriſdiction, the ſtatute 34 and 35 H. 8. c. 26. ſect. 115. had given it a concurrent one.

Reſpecting the objection that the king's bench had not ever exerciſed any juriſdiction; it was anſwered, that it had not, till lately, ſent writs of latitat to the cinque ports. That a juriſdiction into Wales exiſted in ſome of the courts in the hall, ſo that all the king's high courts neceſſarily had the ſame authority. And as to the maxim *quod breve domini regis non currit in Walliâ*; that it was ſaid had been explained by judge Atkins, 2 Mod. 12. (g) and could not mean that no writ runs into Wales from Weſtminſter-hall, the contrary being admitted on all hands.

In anſwer to this, it was inſiſted, on the part of the defendant, that, in the ſpace of 450 years, this court had not iſſued any latitat into Wales, and that if long uſage gave juriſdiction, that non-uſage was the ſtrongeſt argument againſt it.

That Wales was no part of the realm of England, neither before nor after the ſtatute 12 E. 1. until the 27 H. 8. nor had the laws of England any efficacy there; therefore this court had not any original juriſdiction. That it had neither claimed nor exerciſed any concurrent or excluſive juriſdiction in Wales, except in ſome things, and in thoſe, only between the lords marchers.

That neither by the ſtatute of union, nor by any other act of recognition, had this court been admitted to have original juriſdiction; and that the 115. ſect. of 34 and 35 H. 8. meant quite an-

(f) 8alk. 411. Plowd. 118. (g) 4 Inſt. 531.

other

other matter; the words "weighty cauſes, and king's council," not meaning the judges here.

David Fluellin ſt was ſaid was not tried at this bar, but moſt probably in Wales by commiſſion. That doctor Wotton on Welch laws, fo. 518. ſpeaks of commiſſions into Wales in extraordinary caſes temp. Ed. 1. which ſhewed that this court had then no juriſdiction.

That the princes of Wales were antiently kings of Wales, 4 Inſt. 239, 243. and that king Edward claimed the ſame feudal ſovereignty over Scotland as he did over Wales. Ryley's Pl. in Parl. 157. This, it was inſiſted, was apparent from the caſe between the kings of England and Scotland; (id. fo. 145. ſame year) *coram domino regi et concilio ſuo*, AND THE JUDGES, which was ſufficiently explanatory, of what was meant by the king's council in the ſtatute 34 and 35 H. 8. c. 26. ſ. 115.

That prior to the ſtatute H 8. all lands in Wales were held by the laws of Wales and not by the laws of England. Co. Ent. quo warr. 549. 4 Inſt. 244. That the writs run *contra pacem* of the lords marchers, who could paſs judgment of life or limb. 27 H. 8. c. 24. Ryley 63. 141. And were competent to hold plea in all actions as well real as perſonal.

That the king's bench had juriſdiction, in two ſorts of cauſes, was not denied; the one being, where the lords marchers themſelves were parties, and the other in *quare impedit*; in the former, it had juriſdiction, becauſe no one could be judge in his own cauſe, and in the latter, becauſe no writ lay to the biſhop; or, if any did, that he would not obey it, conceiving himſelf in point of dignity at leaſt equal, if not ſuperior, to a lord marcher. To ſhew that Wales was no part of England, that this court had never exerciſed any juriſdiction there, except in caſes where lands were held of the king, and as above mentioned; and to point out the difference between Wales and counties palatine. Fitz. juriſdic. 34. 26 H. 6. 34. 3 Ed. 3. 19. 40 Ed. 3. 1. 11 H. 6. 3. 19 H. 6. 12. were quoted as appoſite and concluſive authorities. That writs of error always laid from counties palatine, but not from Wales, before 34 H. 8. Wales not being any part of England.

As to the poſition that the ſtatute of H. 8. gave this court juriſdiction by introducing the laws of England into Wales; it was poſitively denied; and, by way of analogy it was inſiſted tha Poyning's law, which introduced the Engliſh laws into Ireland did not give the court here, juriſdiction there.

That between the 27 and 34 H. 8. which laſt ſtatute gives the writ of error in real and mixt actions, no writ of error had been brought in this court, and if it had original juriſdiction, there would have been no occaſion to give the writ of

error by the ſtatute 34 H. 8. ſect. 103. and as error was thus given in real actions and mixed, ſo by the ſtatute W. 3. it was alſo given in perſonal actions.

That the gentlemen on the other ſide would have "weighty "cauſes" in the ſtatute 34 and 35 H. 8. to be underſtood to mean all cauſes, which they did not; (*b*) that they would alſo have "king's council" to mean the judges; when it was notorious that in Henry the eighth's time, it meant the king's privy council, and ſometimes the houſe of lords, as the great council of the nation; that the judges, at that time, were never mentioned as the king's council, but were known by the name of his juſtices or judges.

As to the objection that this court and the common pleas ſend executions into Wales, and the inferred interrogatory, why they might not ſend firſt proceſs thither? it was anſwered, that there had been long uſage in the one caſe, without which there would be a failure of juſtice; but that in the other, there had not been any uſage at all; that Wales had ſuperior courts of its own: and as to the exchequer, the king and his debtors it was granted had ever had prerogative proceſs into Wales, which had never been diſputed.

The ſubject being thus exhauſted, the court unanimouſly gave judgment for the defendant.

NOTE [C] p. 190.

The Iſle of Man is a diſtinct territory from England, and is not governed by our laws: neither doth any act of parliament extend to it, unleſs it be particularly named therein; and then an act of parliament is binding there. (*a*) It was formerly a ſubordinate feudatory kingdom, ſubject to the kings of Norway; then to king John and Henry III. of England; afterward to the kings of Scotland; and then again to the crown of England: at length we find king Henry IV. claiming the iſland by right of conqueſt, and diſpoſing of it to the earl of Northumberland; upon whoſe attainder it was granted (by the name of the lordſhip of Man) to ſir John de Stanley by letters patent 7 Henry IV.

Thoſe who formerly poſſeſſed this territory, ſtiled themſelves kings. *Rex Manniæ & Inſularum*, was a common inſcription on their ſeals, and in truth they were ſo titled by their ſuperior lords. *Sciatis* (ſays Henry the third (*b*) *quod dilectus et fidelis noſter Reginaldus rex de Man venit ad fidem & ſervitium noſtrum & nobis*

(*b*) Ryley 98, 211. (*a*) 4 Inſt. 284. 2 And. 116. (*b*) Pat. 3 Hen. 3. membr. 1.

homagium fecit. But they were alſo in later times, titled the lords of *Man*, *domini Manniæ*, by which title the dignity was not ſo reſtrained that the name of king was taken away. For it is related, that the lords of Man had withal the name of king, and might uſe alſo a crown of gold: ſo ſays Thomas of Walſingham, where he relates, that William Montague earl of Saliſbury, under Richard II. ſold the iſle to ſir William Scrop. *Willielmus Scrop* (*c*) *emit de domino Willielmo de Monteacuto comite de Sarum inſulam Euboniæ* (which is the old name of the iſle) CUM CORONA, NEMPE DOMINUS HUJUS INSULÆ REX VOCATUR CUI ETIAM FAS EST CORONA AUREA CORONARI, and another to the ſame purpoſe in the public library at Oxford. (*d*) *Eſt nempe jus illius inſulæ ut quiſquis illius ſit dominus rex vocetur cui etiam fas eſt corona regia coronari.* But in thoſe gifts of this iſland which were made by our kings, to ſuch as have been ſince ſtiled kings of Man, the name of king or kingdom is not to be found, only the title of *lord*; but with liberty to hold it as amply and as freely as any had before held it. And whilſt it was in the hands of the earl of Saliſbury, he titled himſelf it ſeems only lord of Man, *Seignor de Man.*

By the name of lordſhip alſo it was given by Henry the fourth to Henry earl of Northumberland as an iſland won by conqueſt from ſir William Scrop. The words of the patent are ſomewhat remarkable:—he gives him (*e*) *inſulam caſtrum, pelam et dominium de Man ac omnia inſulas et dominia eidem inſulæ de Man pertinentia, quæ fuerunt Willielmi le Scrop chivaler defuncti quem nuper in vita ſuâ conqueſtati fuimus et ipſum ſic conqueſtatum decrevimus & quæ ratione conqueſtus illius tanquam conqueſtata cepimus in manum noſtram, quæ quidem decretum & conqueſtus in præſenti parliamento noſtro,* (that is the parliament of the firſt year of his reign) *de aſſenſu dominorum temporalium in eodem parliamento exiſtentium quoad perſonam præfati Willielmi ac omnia terras et tenementa bona et catalla ſua tam infra dictum regnum quam extra ad ſupplicationem communitatis dicti regni noſtri affirmata exiſtunt.*

Some years afterwards the earl of Northumberland forfeited it, and it was in the ſame words given to ſir John Stanley (*f*) to hold in fee by the tenure of two falcons, to be preſented to the king at his coronation; but the tenure of the earl of Northumberland was to carry the ſword called Lancaſter ſword, which Henry the fourth wore when he firſt arrived in England, at the coronations of the king and his ſucceſſors (*g*).

(*c*) 7 Rich. 2. ſub. ann. D. 1393. P. 337.

(*d*) Chron. mſ. ab ann. 43. H. 3. and 7 H. 5. *cui ſciolus aliquis nomen Guil. Riſhanger temere nuper præfixit ſub. ann. D.* 1392.

(*e*) Pat. 1 H. 4. part 5. membr. 36.

(*f*) Pat. 7 H. 4. part 2. membr. 18.

(*g*) Seld. tit. hon. 1. 3.

In his lineal deſcendants it continued for eight generations, till the death of Ferdinand, earl of Derby, A. D. 1594: when a controverſy aroſe concerning the inheritance thereof, between his daughters and William his ſurviving brother: upon which, and a doubt that was ſtarted concerning the validity of the original patent, (*b*) the iſland was ſeiſed into the queen's hands, and afterwards various grants were made of it by king James the firſt; all which being expired or ſurrendered, it was granted afreſh in 7 Jac. I. to William earl of Derby, and the heirs male of his body, with remainder to his heirs general; which grant was the next year confirmed by act of parliament, with a reſtraint of the power of alienation by the ſaid earl and his iſſue male. On the death of James earl of Derby, A. D. 1735, the male line of earl William failing, the duke of Atholl ſucceeded to the iſland as heir general by a female branch. In the mean time, though the title of king had long been diſuſed, the earls of Derby, as lords of Man, had maintained a ſort of royal authority therein; by aſſenting to or diſſenting from laws, and exerciſing an appellate juriſdiction. Yet, though no Engliſh writ, or proceſs from the courts of Weſtminſter, was of any authority in Man, an appeal lay from a decree of the lord of the iſland to the king of Great Britain in council, as is apparent, from the caſe hereafter ſtated. But the diſtinct juriſdiction of this little ſubordinate royalty being found inconvenient for the purpoſes of public juſtice, and for the revenue, authority was given to the treaſury by the 12 Geo. I. c. 28. to purchaſe the intereſt of the then proprietors for the uſe of the crown: which purchaſe was at length compleated in the year 1765, and confirmed by ſtatutes 5 Geo. III. c. 26 and 39. whereby the whole iſland and all its dependencies, ſo granted (except the landed property of the Atholl family, their manerial rights and emoluments, and the patronage of the biſhoprick (*i*) and other eccleſiaſtical benefices) for the ſum of 70,000l. are unalienably veſted in the crown, and ſubjected to the regulations of the Britiſh exciſe and cuſtoms. Blac. Com. 1 v. 105.

Chriſtian verſus Corren. The earl of Derby, king of the Iſle of Man, made a decree in that iſland concerning lands there; and the perſon, againſt whom the decree was made, appealed to the king of Great Britain in council; and (before a committee of council at the Cockpit, in Michaelmas term 1716.) the principal queſtion was, whether an appeal did lie before the king in

(*b*) Camden Eliz. A. D. 1594.

(*i*) The biſhoprick of Man, or Sodor, or Sodor and Man, was formerly within the province of Canterbury, but annexed to that of York by ſtatute 33 Henry VIII. c. 31.

council,

council; there being no reſervation in the grant, made of the iſle of Man by the crown, of the right of appeal to the crown.

It was urged for the appeal, that it appearing, that Henry IV. had granted the iſle of Man to the earl of Derby's anceſtors, to hold by homage and other ſervices, though there was no reſervation of the ſubject's right of appeal to the crown, yet that this liberty was plainly implied. For that ſuch a liberty of appeal lay in all caſes where there was a tenure of the crown; that it was the right of the ſubjects to appeal to the ſovereign, to redreſs a wrong done to them in any court of juſtice; nay, if there had been any expreſs words in the grant to *exclude* appeals, they had been void; becauſe the ſubjects had an inherent right, inſeparable from them as ſubjects, to apply to the crown for juſtice. And on the other hand,

The king, as the *fountain of juſtice*, had an inherent right inſeparable from the crown, to diſtribute juſtice among his ſubjects; and if this were a right in the ſubjects, no grant could deprive them of it; the conſequence of which would be, that in all caſes, where there were words excluſive of ſuch right of appeal, the king would be conſtrued to be deceived, and his grant to be void.

Lord chief juſtice Parker, who aſſiſted at council upon this occaſion, thought that the king in council had neceſſarily a juriſdiction in this caſe, in order to prevent a failure of juſtice; and took notice, that if a copyholder ſhould ſue by petition in the lord's court, upon which the lord ſhould give judgment, though no appeal or writ of error would be of ſuch judgment, yet the court of chancery would correct the proceedings, in caſe any thing were done therein againſt conſcience.

Whereupon their lordſhips proceeded in this appeal and determined in favour of the appellant; and it is obſervable, that lord Derby, rather than that ſome things in the grant made by the crown to his anceſtors ſhould be looked into, choſe to ſubmit, expreſſing his conſent, that the matters in queſtion on the appeal ſhould be examined by the king in council. (*k*)

NOTE [D] p. 190.

The town of Berwick upon Tweed was originally part of the kingdom of Scotland; and, as ſuch, was for a time reduced by Edward I. into the poſſeſſion of the crown of England: and, during ſuch ſubjection, it received from that prince a charter,

(*k*) Peere Wms. 1 v. 329. 2 Eq. Ca. Abr. 81. pl. 3.

which (after its ſubſequent ceſſion by Edward Balliol, to be for ever united to the crown and realm of England) was confirmed by Edward III. with ſome additions; particularly that it ſhould be governed by the laws and uſages which it enjoyed before its reduction by Edward I. Its conſtitution was new-modelled, and put upon an Engliſh footing by a charter of James I. and all its franchiſes were confirmed in parliament by the 22 Edw. IV. c. 8. and the 2 Jac. 1. c. 28. therefore though it has ſome local peculiarities, derived from the ancient laws of Scotland, yet it is clearly part of the realm of England, being repreſented by burgeſſes in the houſe of commons, and bound by all acts of the Britiſh parliament, whether ſpecially named or not. And therefore it was (perhaps ſuperfluouſly) declared by the 20 Geo. II. c. 42. that, where England only is mentioned in any act of parliament, the ſame notwithſtanding hath and ſhall be deemed to comprehend the dominion of Wales and town of Berwick upon Tweed. And tho' certain writs from the courts at Weſtminſter, do not uſually run into Berwick any more than into the principality of Wales, yet it hath been ſolemnly adjudged that all prerogative writs (as thoſe of *mandamus*, prohibition, *habeas corpus*, *certiorari*, &c.) may iſſue to Berwick as well as to every other of the dominions of the crown of England, and that indictments and other local matters ariſing in the town of Berwick may be tried by a jury of the county of Northumberland. Blac. Com. 1 v. 99. Vide alſo 1 Sid. 382, 462. 2 Show. 365. Cro. Jac. 543. 2 Roll. Abr. 292. Stat. 11 Geo. I. c. 4.

Sir Edward Coke, in Calvin's caſe, 7 Co. 23. b. ſays, that "Berwick is no part of England nor governed by the laws of "England." Sir Matthew Hale follows him, and ſays, "Ber-"wick was ſometime parcel of Scotland; but was won by con-"queſt by king Edward the firſt, and after that, loſt by king "Edward the ſecond, and afterwards regained by Edward the "third. It was governed by the laws of Scotland, and their "own particular cuſtoms; and not according to the rules of the "law of England, farther than as by cuſtom it is there admit-"ted." "Yet now," ſays he, "by *charter*, they ſend bur-"geſſes to the parliament of England."

In Calvin's caſe, there was no queſtion concerning the conſtitution of Berwick: a mere obiter opinion, thrown out by way of argument and example. Coke was fond of multiplying authorities; and, to illuſtrate his ſubject, was apt, beſides ſuch authorities as were ſtrictly applicable, to cite other caſes, which were not applicable to the particular queſtion under his judicial conſideration. In the caſe then under judicial conſideration, the queſtion

queſtion was, (*a*) "Whether Robert Calvin the plaintiff, born "in Scotland after the deſcent of the crown of England to "king James the firſt, was an Alien born, and conſequently "diſabled to bring any real or perſonal action for any lands "within the realm of England." But it never was a doubt, "whether a perſon born in the conquered dominions of a coun-"try is ſubject to the king of the conquering country;" and therefore the argument did not hold, from the caſe of Berwick to the point then in queſtion: neither was the caſe of Calais (*b*) in any ſort appoſite to it.

As to the laws by which Berwick is governed—whatever may be the caſe, when more particularly inquired into, with regard to their civil (*c*) conſtitution, it appears very ſufficiently, that, "in pleas of the crown, Berwick has no other laws by which it "is governed, but the laws of England." The ſtatute of 11 Geo. 2. c. 19. for the more effectual ſecuring the payment of rents and preventing frauds by tenants, ſuppoſes this—all the proviſions of that act are extended to Berwick, (*d*) by name. Some of theſe proviſions relate to (*e*) ejectments, which concern civil matters: and they proceed there, by ejectment. But it is manifeſt that lord Coke is miſtaken in ſaying, generally, "that "Berwick was not governed by the laws of England." For, in criminal matters, the fact is clearly otherwiſe. And Hale is as clearly miſtaken, in ſaying, "that Berwick ſends members to the "parliament of England, by *charter*." For 'tis by writ of ſummons that they ſend them thither, in conſequence of their being a borough. Cheſter, both county and city, firſt ſent members to parliament, by virtue of an act of parliament, (*f*) made in Henry the eighth's time. By lord Mansfield in the caſe of Rex verſus Cowle. Vide the caſe paſſim, well reported by ſir James Burrow in the ſecond volume of his reports from fo. 834 to fo. 864.

NOTE [E] p. 191.

KING JOHN conſtituted 12 coronatores ad placita et jura corona conſervanda, et conceſſit quod ballivus per viſum coronator' placitare ſine brevi poterit de aſſiſa novæ diſſeiſinæ, de morte anteceſſor', et de dote, infra annum. 4 Inſt. 286. App. H. Jer. N. 1.

(*a*) Calvin's caſe, fo. 2. a.
(*b*) Calvin's caſe 22. a.
(*c*) Fitzerbert's abridgment, title obligation, pl. 15.
(*d*) § 1, 11.
(*e*) § 12, 13.
(*f*) 34 H. 8. c. 13.

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The 12 coroners are elected by the country upon death, and ſworn, and ought with the juſtices, or (if they are abſent) by themſelves, judicare de omnibus caſubus in inſulâ emergen', (exceptis nimis arduis, as high treaſon, &c.) amerciamenta, taxare, &c. App. ibm.

Placitum in inſulâ coram aliquibus juſt.' inceptum non debet extra inſulam adjornari. App. ibm.

Nullus de tenemento quod per annum et diem quiete tenuit, ſine brevi de cancel' reſpondere teneatur. App. ibm.

Nullus debet impriſonari in caſtro, niſi in cauſâ criminali, et hoc per judicium coronator' jurat.' App. ibm.

CHAP.

CHAP. X.

Concerning the communication of the laws of England *unto the kingdom of* Scotland.

BECAUSE this inquiry will be of uſe, not only in itſelf, but alſo as a parallel diſcovery of the tranſmiſſion of the Engliſh laws into Scotland, as before is ſhewn they were into Normandy, I ſhall in this chapter purſue and ſolve their ſeveral queries, viz.

Firſt, what laws of Scotland hold a congruity and ſuitableneſs with thoſe of England.

Secondly, whether theſe be a ſufficient ground for us to ſuppoſe, that that ſimilitude or congruity, began with a conformation of THEIR laws to thoſe of England. And,

Thirdly, what might be reaſonably judged to be the MEANS, or REASON, of the conformation of their laws unto the laws of England.

As to the firſt of theſe inquiries; it is plain, beyond all contradiction, that many of the laws of Scotland hold a congruity and ſimilitude, and MANY of them a PERFECT IDENTITY, with the laws of England; at leaſt as the Engliſh laws ſtood in the times of Henry II. Richard I. king John, Henry III. and Edward I. And although in Scotland, uſe hath always been made of the CIVIL LAW, in point of direction, or guidance, where their municipal laws, either cuſtomary or parliamentary, failed; yet, as to their particular municipal laws, we ſhall find a RESEMBLANCE, PARITY AND IDENTITY, in their laws with the laws of England, anciently in uſe(*a*); and we need go no further for

(*a*) The law of Scotland (ſays Mr. Barrington) agreed anciently not only with the principles of the law of England, but in its practice, tho' there might be ſome variances —of no great importance. Vide Obſ. on Stat. 111. Mr. Juſtice Blackſtone admits "a great reſemblance" — yet he ſeems to queſtion "an identity" in their laws, on the acceſſion of James the ſixth to the crown of England. Com. 1 v. 95.

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evidence hereof, than the Regiam Majeſtatem, (*b*) a book publiſhed by Mr. Skeen in Scotland. It would be too long to inſtance in all the points that might be produced; and therefore I ſhall ſingle out ſome few, remitting the reader for his further ſatisfaction to the book itſelf. [A]

Dower of the wife, to be the THIRD part of her huſband's lands of inheritance; the writ to recover the ſame; the means of forfeiting thereof by treaſon or felony of the huſband; or adultery of the wife; are in great meaſure conformable to the laws of England. Vide Regiam Majeſtatem, lib. 2. cap. 16, 17. and Quoniam Attachiamento, (*c*) *cap.* 85.

The excluſion of the deſcent to the ELDER brother, by his receiving homage; which though now antiquated in England, was anciently received here for law; as appears by Glanville, lib. 7. cap. 1. and vide Regiam Majeſtatem, lib. 2. cap. 22.

The excluſion of daughters from inheritances, by a ſon: the deſcent to all the daughters in coparcenary, for want of ſons; the chief houſe allotted to the eldeſt daughter upon this partition; the deſcent to the collateral heirs, for want of lineal, &c. Ibid. cap. 24, 25, 26, 27, 28, 33, 34. But this is now altered in ſome things per Stat. Rob. cap. 3.

The full ages of males 21, of females 14, to be out of ward in ſocage 16. Ibid. cap. 42.

That the cuſtody of idiots belonged to the king. Ibid. cap. 46.

The cuſtody of heirs in ſocage belong to the next of kin, to whom the inheritance can't deſcend. Vide Regiam Majeſt. cap. 47.

The ſon born BEFORE marriage, or baſtard eigne, not to be legimitate by the marriage after; nor was he hereditable

(*b*) The book is ſo called, becauſe, (according to ſir Edward Coke) "it beginneth (as Juſtinian's Inſtitutes do) with theſe words—Regiam Majeſtatem."—4 Inſt. 345 ——If I am not miſtaken, the Inſtitutes of Juſtinian begin—"de uſu armorum et legum—and then proceeded IMPERATORIAM *Majeſtatem non ſolum* ARMIS DECORATAM, &c.

(*c*) This book, which is an ancient book in the Scotch law, is entitled, *Quoniam Attachiamenta*, "becauſe (ſays ſir Edward Coke) it beginneth with thoſe two words." 4 Inſt. 345.

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by the ancient laws of Scotland, though afterward altered in uſe, as it ſeems. Regiam Majeſt. cap. 51.

The confiſcation of bona uſariorum, after their death, conform to the old law here uſed. Ibid. cap. 54. though now antiquated.

The laws of eſcheats, for want of heirs, or upon attainder. Ibid. cap. 55.

The acquittal of lands given in frank-marriage, till the fourth degree be paſt. Ibid. cap. 57.

Homage, the manner of making it with the perſons, by, or to whom, as in England. Ibid. cap. 61, 62, 63, &c.

The relief of an heir in knights ſervice, of full age. Regiam Majeſtatem, cap. 17.

The preference of the ſiſter of the WHOLE blood, before the ſiſter of the HALF blood. Quoniam Attachiamento, cap. 89.

The ſingle value of the marriage, and forfeiture of the double value, preciſely agree with the ſtatute of Marlbridge. Ibid. cap. 91.

The forfeiture of the lord's diſparaging his ward in marriage, agrees with magna charta, and the ſtatute of Marlbridge. Quoniam Attachiamento, cap. 92.

The preference of the lord, by priority, to the cuſtody of the ward. Ibid. cap. 95.

The puniſhment of the raviſher of a ward, by two years impriſonment, &c. as here. Ibid. cap. 90.

The juriſdiction of the lord in Ingfantheof. Ibid. cap. 100.

Goods confiſcate, and Deodands, as here. Liber De Modo tenendi Cur. Baron. cap. 62, 63, 64.

And the like of waifs. Ibid. cap. 65.

Widows, not to marry without conſent of the lord. Statute Meſei. 2. cap. 23.

Wreck of the ſea, defined preciſely as in the ſtat. Weſtm. 2. Vide ibid. cap. 25.

The diviſion of the deceaſed's GOODS,—one third to the wife, another third to the children, and another to the executor, &c. conformable to the ANCIENT law of England, and the cuſtom of the North to this day. Lib. 2. cap. 37.

Alſo the proceedings to recover poſſeſſions, by mortdanceſtor, juris utrum, aſſiſe de novel diſſeiſin, &c. The writs

writs and proceſs are much the ſame with thoſe in England, and are directed according to Glanville, and the old ſtatutes in the time of Edward I. and Henry III. Vide Regiam Majeſtat. lib. 3. cap. 27 to 36.

Many more inſtances might be given, of many of the municipal laws of Scotland, either preciſely the ſame with thoſe in England, or very near, and like to them (*d*): tho' it is true, they have ſome particular laws, that hold not that conformity to ours, which were introduced either by particular, or common cuſtoms, or by acts of their parliaments. But, by what has been ſaid and inſtanced in, it appears, that like as between the laws of England and Normandy, ſo alſo between the laws of England and Scotland, there was ANCIENTLY a great ſimilitude and likeneſs.

I come therefore to the ſecond thing I propoſed to enquire into, viz.—what evidence there is, that thoſe laws of Scotland were either *deſumed* (*e*) from the Engliſh laws; or, from England, tranſmitted thither in ſuch a manner, as that the laws HERE in England, were, as it were, THE ORIGINAL OR PRIME EXEMPLAR, out of which thoſe parallel, or ſimilar laws of Scotland were copied, or tranſcribed, into the body of their laws: and this appears evident on the following reaſons, viz.

Firſt, for that Glanville, which, as has been obſerved, is the ancienteſt collection we have of Engliſh laws (*f*), ſeems to be even tranſcribed, in many entire capita of the laws above-mentioned; and in ſome others, where Glanville doubts, that book doubts; and where Glanville follows the practice of the laws then in uſe, though altered in ſucceeding times, at leaſt after the reign of Edward I.

(*d*) It ſhould ſeem from the *Regiam Majeſtatem*, that the trial by jury was, in civil matters, uſed in Scotland, ſo early as David I. who began to reign in 1124.—"When the twelve royal men compeer and paſs upon the aſſize, they ſhall proceed and try qhuilk of the parties, the perſewer or the defendant, hath beſt richt to the londs clamed."—This is cited from Skene's tranſlation of the *Regiam Majeſtatem*.

(*e*) Sir Matthew Hale is, I believe, the only author in our language, that can be adduced in ſupport of the above derivative.

(*f*) Vide ante note (*m*) on ch. 7.

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there the Regiam Majeſtatem does accordingly; for inſtance, viz.

Glanville, lib. 7. cap. 1. determines, that a man can't give away part of the lands which he held by hereditary deſcent, unto his baſtard, WITHOUT THE CONSENT OF HIS HEIR; and that he may not give ALL his purchaſes from his eldeſt ſon; and this is alſo declared to be the law of Scotland accordingly. Regiam Majeſtatem, lib. 2. cap. 19, 20. Though ſince Glanville's time the law has been altered in England.

Alſo Glanville, lib. 7. cap. 1. makes a great doubt, whether the ſecond ſon, being enfeoffed by the father, and dying without iſſue; the land ſhall return to the father, or deſcend to his eldeſt, or to his youngeſt brother; and at laſt gives ſuch a deciſion as we find almoſt in the ſame terms and words recited in the queſtion and deciſions laid down in Regiam Majeſt. lib. 2. cap. 22.

Again, Glanville, lib. 7. cap. 1. makes it a difficult queſtion in his time, whether the eldeſt ſon dying in the life-time of his father, HAVING ISSUE, the nephew, or the youngeſt ſon ſhall inherit; and gives the arguments pro & contra: and Regiam Majeſtatem, cap. 33. ſeems to be even a tranſcript thereof out of Glanville.

And further, the tract concerning aſſizes, and the time of limitation; the very form of the writs, and the method of the proceſs, and the directions touching their proceedings, are but tranſcripts of Glanville; as appears by comparing Regiam Majeſtatem, lib. 3. cap. 36. with Glanville, lib. 13. cap. 32. and the collector of thoſe laws of Scotland in all the before-mentioned places, and divers others, quotes Glanville as the PATTERN at leaſt, of thoſe laws.

But ſecondly, a ſecond evidence is, becauſe many of the laws which are mentioned in the Regiam Majeſtatem, Quoniam Attachiamento, and other collections of the Scottiſh laws, are in truth VERY TRANSLATIONS of ſeveral ſtatutes made in England in the times of king Henry III. and king Edward I. For inſtance; the ſtatute of their king Robert II. cap. 1. touching alienations to religious men, is nothing elſe but an enacting of the ſtatute of mortmain, 13 Edw. I. cap. 13. The law above-mentioned, touching the

the diſparagement of wards, is deſumed out of magna charta, cap. 6. and the ſtatute of Merton, cap. 6. So the law aboveſaid; againſt raviſhers of wards, is taken out of Weſtm. 2. cap. 35. So the ſaid law of the double value of marriage, is taken out of Weſtm. 1. cap. 22. The law concerning wreck of the ſea, is but a tranſcript out of Weſtm. 1. cap. 4. and divers other inſtances of like nature might be given, whereby it may appear, that very many of thoſe laws in Scotland which are a part of their corpus juris, bear a ſimilitude to the laws of England, and were taken, as it were, out of thoſe common or ſtatute laws here, that obtained in the time of Edward I. and before; but eſpecially ſuch as were in uſe or enacted in the time of Edward I.:—and the laws of England, relative to thoſe matters, were, as it were, the original and exemplar, from whence thoſe ſimilar, or parallel, laws of Scotland, were derived or borrowed.

Thirdly, I come now to conſider the third particular, viz. by what means, or by what reaſon, this ſimilitude of laws in England and Scotland happened; or upon what account, or how the laws of England, at leaſt in many particulars, or capita legum, came to be communicated unto Scotland; and they ſeem to be principally theſe two, viz. firſt, the VICINITY of that kingdom to this. And ſecondly, the SUBJECTION of that kingdom unto the kings of England, at leaſt for ſome conſiderable time.

Touching the former of theſe; firſt, it is very well known, that England and Scotland made but ONE ISLAND, (g) divided not by the ſea, or any conſiderable arm thereof, but only by the interjacency of the river Tweed, and ſome deſart ground, which did not hinder any eaſy, common acceſs, of the people of the one kingdom, to the other: and by this means, firſt, the intercourſe of commerce between that kingdom and this, was very frequent and uſual, eſpecially in the northern counties; and this intercourſe of commerce brought unto thoſe of Scotland an acquaintance and familiarity with our Engliſh laws and cuſtoms, which in

(g) By the 1 Jac. 1. cap. 1. it is declared, that theſe two mighty, famous, and ancient kingdoms, were formerly one.

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proceſs of time were adopted and received gradually into Scotland. (*b*)

Again, ſecondly, this vicinity gave often opportunities of tranſplanting of perſons, of either nation, into the other; eſpecially in thoſe northern parts; and thereby the Engliſh tranſplanted and carried with them the uſe of their native cuſtoms of England; and the Scots, tranſplanted hither, became acquainted with our cuſtoms, which by occaſional remigrations were gradually tranſlated, and became diffuſed and planted in Scotland; and it is well known, that, upon this account, ſome of the nobility and great men of Scotland had poſſeſſions HERE as well as there: the earls of Angus were not only noblemen of Scotland, but were alſo barons of parliament HERE, and ſat in our Engliſh parliaments, as appears by the ſummons to parliament, tempore Edvardi tertii.

Again, thirdly, the kings of Scotland had FEODAL poſſeſſions HERE; for inſtance, the counties of Cumberland, Northumberland and Weſtmorland, were anciently held of the crown of England by the kings of Scotland, attended with ſeveral viciſſitudes and changes until the feaſt of St. Michael, 1237;—at which time, Alexander king of Scotland finally releaſed his pretenſions thereunto; as appears by the deed thereof entered into the red-book of the exchequer, and the parliament book of 20 Edw. I. and in conſideration thereof, Henry III. gave him the lands of Penreth and Sourby, habend' ſibi heredibus ſuis regibus Scotiæ, and, by virtue of that ſpecial limitation, they came to

(*b*) A remarkable proof of the LITTLE intercourſe between the Engliſh and the Scots, before the union of the crowns in the perſon of James I. is to be found in two curious papers, one publiſhed by Haynes, the other by Strype. In the year 1567, Elizabeth commanded the biſhop of London to take a ſurvey of all the ſtrangers within the cities of London and Weſtminſter.—By his report, which is very minute, it appears, that the whole number of Scots at that time was only FIFTY-EIGHT. Haynes 455.—A ſurvey of the ſame kind was made by ſir T. Row, lord mayor, A. D. 1568.—The number of Scots had then encreaſed to EIGHTY-EIGHT.—Strype 4.—On the acceſſion of James, a conſiderable number of Scots, eſpecially of the higher rank, reſorted to England; but it was not till the union that the intercourſe between the two kingdoms became great. Robert. Hiſt. Scot. v. 2. pa. 304.

John the eldeſt ſon of the eldeſt daughter of Alexander king of Scotland, together with that kingdom; but the land of Tindale, and the manor of Huntingdon, which were likewiſe given to him and his heirs, but without that ſpecial limitation, REGIBUS SCOTIÆ, fell in coparcenry; one moiety thereof to the ſaid John king of Scotland, as the iſſue of the eldeſt daughter, and the other moiety to Haſtings, who was deſcended from the younger daughter of the ſaid Alexander: but thoſe poſſeſſions came again to the crown of England by the forfeiture of king John of Scotland; who, through the favour of the king of England, had reſtitution of the kingdom of Scotland, yet never had reſtitution of thoſe poſſeſſions he had in England, and forfeited and loſt by his levying war againſt the kingdom of England, as aforeſaid.

And thus I have ſhewn, that the vicinity of the kingdoms of England and Scotland, and the conſequence thereof, viz. tranſlations of perſons and families, intercourſe of trade and commerce, and poſſeſſions obtained by the natives of each kingdom in the other, might be one means for communicating OUR LAWS to them.

But ſecondly, there was another means far more effectual for that end, viz. the ſuperiority and intereſt that the kings of England obtained over the crown and kingdom of Scotland; whereby it is no wonder that many of our Engliſh laws were tranſplanted thither, by the power of the Engliſh kings. This intereſt, dominion, or ſuperiority of the kings of England in the realm of Scotland, may be conſidered theſe two ways, viz. firſt, how it ſtood antecedently to the reign of king Edward I. And ſecondly, how it ſtood in his time.

Touching the former of theſe, I ſhall not trouble myſelf with collecting arguments or authorities relating thereto; he that deſires to ſee the whole ſtory thereof, let him conſult Walſingham, ſub anno 18 Edw. I. as alſo Rot. Parl. 12 R. II. Pars ſecunda, N° 3. Rot. Clauſ. 29 E. I. M. 10. Dorſo, and the letter of the nobility to the pope aſſerting it. Ibid.

And this might be one means, whereby the laws of England in elder times might in ſome meaſure be introduced into Scotland.

But

But I rather come to the times of king Edward I. who was certainly THE GREATEST REFINER of the Engliſh laws, and ſtudiouſly endeavoured to enlarge the dominions of the crown of England, and to extend and propagate the laws of England into all parts ſubject to his dominion. This prince, beſides the ancient claim he made to the ſuperiority of the crown of England over that of Scotland, did for many years ACTUALLY ENJOY that ſuperiority in its full extent; and the occaſion and progreſs thereof was thus, as it is related by Walſingham, and conſonantly to him appears by the records of thoſe times; viz. king Edward. I. having formerly received the homage and fealty of Alexander king of Scots, as appears Rot. Clauſ. 5 E. 1. M. 5. Dorſo, was taken to be ſuperior dominus Scotiæ regni. [B]

Alexander dying, left Margaret his only daughter, and ſhe dying without iſſue, about 18 E. I. there fell a controverſy touching the ſucceſſion of the crown of Scotland, between the king of Norway, claiming AS TENANT BY THE CURTESY, Robert de Bruce deſcended from the younger daughter of David king of Scots, and John de Baliol deſcended from the elder daughter, with divers other competitors.

All the competitors ſubmit their claim to the deciſion of Edward I. king of England as SUPERIOR DOMINUS REGNI SCOTIÆ; who thereupon pronounced his ſentence for John de Baliol, and accordingly put him in poſſeſſion of the kingdom, and required and received his homage.

The king of England, notwithſtanding this, kept ſtill the poſſeſſion ET INSIONIA of his ſuperiority; his court of king's bench ſate actually at Roxborough in Scotland, Mich. 20, 21 Ed. I. coram rege; and upon complaint of injuries done by the ſaid John king of Scots, now reſtored to his kingdom, he ſummoned him OFTEN, to anſwer in HIS courts. Mich. 21, 22 Edw. I, Northumb. Scot. He was ſummoned by the ſheriff of Northumberland to anſwer to Walbeſi in the king's court. Paſ. 21 Edw. I. coram rege. Rot. 34. He was in like manner ſummoned to anſwer John Mazune in the king's bench for an injury done to him; and judgment given againſt the king of Scots, and that judgment executed.

John king of Scots, being not contented with this ſubjection, did in the twenty-fourth year of king Edward I. reſign back his homage to king Edward, and bid defiance to him; wherefore king Edward I. the ſame year, with a powerful army entered Scotland, took the king of Scots priſoner, and the GREATEST PART (*i*) of that kingdom into his poſſeſſion; and appointed the earl Warren to be cuſtos regni,—Creſſingham to be his treaſurer,—and Ormſby his juſtice; and commanded his judges of his courts of England to iſſue the king of England's writs INTO SCOTLAND.

And when, in the twenty ſeventh year of his reign, the pope, inſtigated by the French king, interpoſed in the behalf of the king of Scotland, he and his nobility reſolutely denied the pope's interceſſion and mediation.

Thus the kingdom of Scotland continued in an ACTUAL ſubjection to the crown of England for many years; for Rot. Clauſ. 33 E. I. Membr. 13. Dorſo, and Rot. Clauſ. 34 E. I. Membr. 3. Dorſo; ſeveral proviſions are made for the better ordering of the government of Scotland.

What proceedings there were herein, in the time of Edward II. and what capitulations and ſtipulations were afterwards made by king Edward III. upon the marriage of his ſiſter by Robert de Bruce, touching the relaxation of the SUPERIUS DOMINIUM of Scotland, is not pertinent to what I aim at; which is to ſhew HOW the Engliſh laws, that were in uſe and force, in the time of Edward I. obtained to be of force in Scotland, which is but this, viz.

King Edward I. having thus obtained the actual ſuperiority of the crown of Scotland, from the beginning of his reign until his twentieth year, and then placing John de Baliol in that kingdom, and yet continuing HIS ſuperiority thereof, and keeping his courts of juſtice, and exerciſing dominion and juriſdiction by his officers and miniſters, in the very bowels of that kingdom;—and afterwards, upon the defection of this king John, in the twenty-fourth of Edward I. taking

(*i*) Hale, in the very next page, ſtates, that Edward took the "WHOLE" of Scotland, into his actual adminiſtration, in conſequence of his defeating John king of Scots.

the WHOLE (*k*) kingdom into his actual adminiſtration, and placing his own judges and great officers there; and commanding his courts of king's bench, &c. HERE, to iſſue their proceſs thither; and continuing in the ACTUAL adminiſtration of the government of that kingdom DURING LIFE:—it is no wonder that thoſe laws which obtained and were in uſe in England, in and before the time of this king, were in a great meaſure tranſlated thither; and poſſibly either by being enacted in that kingdom, or at leaſt for ſo long time put in uſe and practice there, many of the laws in uſe and practice HERE IN ENGLAND were, in his time, ſo rivetted and ſettled, in THAT kingdom, that it is no wonder to find they were not ſhaken, or altered, by the liberal conceſſions made afterwards by king Edward III. upon the marriage of his ſiſter; but that they remain part of the municipal laws of that kingdom TO THIS DAY.

And that which renders it more evident, that this was one of the greateſt means of fixing and continuing the laws of England in Scotland, is this, viz. this very king Edward I. was not only a martial and victorious, but alſo A VERY WISE AND PRUDENT PRINCE,—one that very well knew how to uſe a victory, as well as obtain it: and therefore knew it was THE BEST MEANS of keeping thoſe dominions he had powerfully obtained, BY SUBSTITUTING AND TRANSLATING HIS OWN LAWS INTO THE KINGDOM WHICH HE HAD THUS SUBDUED. Thus he did upon his conqueſt of Wales; and doubtleſs thus he did upon his conqueſt of Scotland; and thoſe laws which we find there, ſo nearly agreeing with the laws of England uſed in his time; eſpecially the ſtatutes of Weſtm. 1. and Weſtm. 2. ARE THE MONUMENTS AND FOOTSTEPS OF HIS WISDOM AND PRUDENCE.

And as thus he was a moſt wiſe prince, and, to ſecure his acqueſts, introduced many other laws of his native kingdom into Scotland; ſo he very well knew the laws of England were excellent laws, fitted for the due adminiſtration of juſtice, to the conſtitution of the governED; and fitted for the preſervation of the peace of a kingdom, and

(*k*) Hale has but juſt before ſtated that the GREATEST PART of Scotland only, not the WHOLE, was ſubjugated.

for the ſecurity of a government: and therefore he was very ſolicitous, by all prudent and careful means imaginable, to graft and plant the laws of England IN ALL PLACES where he might; having before-hand uſed all poſſible care and induſtry for rectifying and refining the Engliſh laws to their greateſt perfection.

Again, it ſeems very evident, that the deſign of king Edward I. was by all means poſſible to unite the kingdom of Scotland (as he had done the principality of Wales) to the crown of England; ſo that thereby Britain might have been one entire monarchy, including Scotland as well as Wales and England, under the ſame ſceptre; and, in order to the accompliſhing thereof, there could not have been a better means than to make the intereſt of Scotland one with England; and to knit them, as it were, together in one communion; which could never have been better done than by eſtabliſhing ONE COMMON LAW AND RULE OF JUSTICE AND COMMERCE among them; and therefore he did, as opportunity and convenience ſerved, tranſlate over to that kingdom as many of our Engliſh cuſtoms and laws as within that compaſs of time he conveniently could.

And thus I have given an eſſay of the reaſons and means, how and why we find ſo many laws in Scotland parallel to thoſe in England, and holding ſo much of congruity and likeneſs to them.

And the reaſon why we have but few of their laws that correſpond with ours of a later date than Edward I. or at leaſt Edward II. is, becauſe ſince the beginning of Edward III. that kingdom has been DISTINCT, and held little communion with us till the union of the two crowns in the perſon of king James I. *(l)* and in ſo great an interval it muſt needs be, that by the intervention and ſucceſſion of new laws, much of what was ſo ancient, as the times of

(l) The kingdom of Scotland, notwithſtanding the union of crowns on the acceſſion of their king, James VI. to that of England, continued an entirely ſeparate and diſtinct kingdom for above a century more, though an union had been long projected; which was judged to be the more eaſy to be done, as both kingdoms were anciently under the ſame government, and ſtill retained a very great reſemblance, though far from an identity, in their laws. Blac. Com. 1 v. 95.

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Edward I. and Edward II. have received many alterations: ſo that it is a great evidence of the excellency of our Engliſh laws, that there remain to this day ſo many of them in force in that part of Great Britain; continuing to bear witneſs, that once that excellent prince Edward I. exerciſed dominion and juriſdiction THERE.

And thus far of the communion of the laws of England to Scotland, and of the means whereby it was effected; from whence it may appear, that as in Wales, Ireland and Normandy, ſo alſo in Scotland, ſuch laws which in thoſe places have a congruity or ſimilitude with the laws of England, were derived from the laws of England, AS FROM THEIR FOUNTAIN AND ORIGINAL; and were NOT derived from any of thoſe places to England. [C]

ADDITIONAL NOTES TO THE TENTH CHAPTER.

NOTE [A] p. 220.

IT is well known, (ſays Mr. Barrington) that the preface and introduction to the regiam majeſtatem, as well as many other parts of that antient book of the Scotch law, are the ſame with our Glanvil; and though formerly there were wars and great animoſities between the two nations, yet, from their vicinity, there was, to a certain degree, a communication of cuſtoms and manners. The learned Craig ſuppoſes, that the Engliſh law is, in ſome particulars, the foundation of that of Scotland, and that the regiam majeſtatem is a mere tranſcript from our Glanvil; other writers upon the Scotch law, particularly Bruce, (*a*) have denied this, aſſerting that the Engliſh is derived from the Scotch; be this as it may, the very point in litigation neceſſarily ſuppoſes an agreement, and connexion.

As for the opinion of Engliſh writers upon this head, (continues Mr. Barrington) I have not happened to meet with one, who ſeems ever to have looked into the Scotch law any further than to have compared Glanvil and the regiam majeſtatem; (*b*) it is alſo very particular, that even in Calvin's caſe, (*c*) when the judges might have paid their court ſo well to James the firſt,

(*a*) "Non prætereundum, virum clariſſimum (ſc. Cragium) (quod in epiſtolâ nuncupatoriâ, et ſexcentis aliis in locis apertè profeſſus eſt) dum regnorum Scotiæ et Angliæ ad unationem velificatur, eum in finem probare adnititur, maximam inter ſe affinitatem habere utriuſque gentis jura, in eo præcipuè operam poſuiſſe ſuam, ut ab Anglorum principum placitis, iſtiuſque gentis conſuetudinibus, mores patrios haud minimâ ex parte defluxiſſe demonſtret. Sed quid (malum!) nobis cum antiquis inviſiſque hoſtibus." Bruce's Princip. Jur. Feud. Edinb. 1713. in ſcopo.

(*b*) See lord Bacon, vol. 2. Whitelock's Comm. on the Parl. writ, vol. 2. p. 272. Reliq. Spelm. p. 72. 4 Inſt. cap. 75.

(*c*) 7 Cok. Rep. p. 1.

by

by ſhewing an affinity between the two laws, there is not even an alluſion to ſuch an agreement. This is the more extraordinary, as this king, in one of his ſpeeches, to the parliament, ſays, "all the law of tenures, wards, liveries, and ſeignories, "is drawn from England; and James the firſt of Scotland, be-"ing educated in England, brought the Engliſh laws in a writ-"ten hand. Barr. pref. p. 5. and on the ſtat. 111.

The regiam majeſtatem, though, in moſt particulars, the ſame with Glanvil, is conſidered as authentic by ſir Edward Coke, and by moſt of the writers upon the Scotch law, except Craig, whoſe opinion Macdonal ſtrongly combats; it may not be improper to obſerve that by a Scotch ſtatute of the year 1425, "it is ſtatute "and ordained, that ſix wiſe men, and diſcreet (ghuilk knawes "the lawes beſt) ſhall be choſen to ſee and examine the buikes "of the law, that is to ſay, *regiam majeſtatem*, and *Quoniam at-*"*tachiamenta*, and mende the lawes that needs mendment." Theſe books therefore were at that time conſidered as the very foundation of the Scotch law, which a ſort of tranſcript from the law of another nation could not have been allowed to be, by the Scotch parliament. Barr. on ſtat. 17.

Sir Edward Coke, obſerving the many circumſtances in which the two nations agreed, ſuppoſes the common law of each to have been originally the ſame; eſpecially as the *regiam majeſtatem*, which contains the rules of the ancient common law of Scotland, in ſubſtance agrees with Glanvil, whoſe book contains the principles of our common law, as it ſtood in the time of Henry the ſecond.—"The book (ſays Coke) doth in ſubſtance agree with "our Glanvil, and moſt commonly *de verbo in verbum*, and many "times our Glanvil is cited therein by ſpecial name." 4 Inſt. 345. "But (continues Coke) by reaſon of their acts of parlia-"ment, which in many points have altered, diminiſhed, and "abrogated many of the old, and made new laws and other pro-"ceedings, the diſtinct kingdoms as they now ſtand have many "different laws." ib. 346. Mr. juſtice Blackſtone, purſuing the ſame idea, remarks that "the many diverſities, ſubſiſting "between the two laws at preſent, may be well enough account-"ed for, from a diverſity of practice in two large and uncom-"municating juriſdictions, and from the acts of two diſtinct "and independent parliaments." Com. 1 v. 95.

Sir Edward Coke recommends it to thoſe who are deſirous of knowing "ſuch *miſcellanea* as he has obſerved concerning Scot-"land, to read the records and authorities following."

The records of parliament from the beginning thereof, for the receivers and tryers of petitions in the lord's houſe. Rot liberat. anno 3 Ed. 1. m. 2. per Johannem Lovetot, Rot. paten. anno

anno 20 Ed. 1. Gilberto comiti Glovorniæ et Hereford. Scotia. Rot. parliament. 21 Ed. 1. inter placita. Rot. 1 and 2. Hovenden, 1194. p. 7. carta regis R. 1. Mat. Weſtm. anno Dom. 1260. p. 302. H. 3. Rot. Scotiæ 21 Ed. 1. Carta E. 1. et literæ Alexand. regis Scotiæ. Rot. Vaſconiæ 25 E. 1. m. 2, 3. in dorſ. Trin. 25 E. 1. coram rege Rot. 6. Norff. Raſe de Tonyes caſe. anno. 29. E. 1. literæ quas rex per ſe et quas comites et barones Angliæ per ſe miſerunt domino papa anno 29 E. 1. authoritate parliamenti, qua irrotulata ſunt etiam in Scaccario. (*d*) Vide Walſingham, 48 and 49.

Rot. pat. 24 E. 1. Epiſcopis Scotiæ, Mich. 33 E. 1. coram rege Rot. 127. Scotia, Rot. parl. 35 E. 1. in brevi de parliamento, et auter 1 E. 2. 1 E. 3. fo. 17. Graye's caſe. 6 E. 3. 18. The Abbot of Crowland's caſe. 9 E. 3. 6. John Darcey's caſe. Rot. pat. 10 E. 3. 2 parſ. Comes Arundel. Rot. parl. 14 E. 3. nu. 15. ſtat. 4. Rot. clauſ. 22 E. 3. et 23 E. 3. breve de parliamento magnifico principi, &c. 22 Aſſ. p. 85. 39 E. 3. fo. 35. Rot. parliament. 42 E. 3. nu. 7. 42 E. 3. fo. 25. 8 R. 2. tit. Cont. clayme. p. 8. ultimo. 13 H. 4. fo. 5. Rot. pat. 2 H. 5. part 3. m. 1. 8 H. 5. fo. 5. 32 H. 6. 25. 20 E. 4. 6. b. Litt. ſect. 100 and 165. 1 part of the inſtitutes. Stat. de 2 and 3 E. 6. cap. 36. Forteſcue cap. 13. Pl. Com. 126. Dier manuſcript 3 Eliz. 22. b. and 13 Eliz. fo. 68. m. 5. Dier 12 Eliz. fo. 287. in print. Lib. 7. fo. 22, 23, &c. Calvin's caſe. Lib. 9. fo. 114, Seignior Zaucher's caſe. 4 Inſt. in the chapter of the high court of parliament.

Polydor. Virgil. Hollinſh. 1 part. fo. 116, 117. 2 part 286. Stowe 303. Math. Weſtm. 425, 428, 443, Walſingham 17, 28, 32, 129, &c.

NOTE [B] p. 227.

It ſhould ſeem that the homage uſually paid by the kings of Scotland was not for their crown, but for ſome other territory. It is probable, that the homage was performed in general terms without any particular ſpecification of territory; and this inaccuracy had proceeded either from ſome diſpute between the two kings about the territory and ſome oppoſite claims, which were compromiſed by the general homage, or from the ſimplicity of the age, which employed few words in every tranſaction. To prove this we need but look into the letter of king Richard, where he reſigns the homage of Scotland, reſerving the uſual ho-

(*d*) Rot. Parl. apud Linc. 29 E. 1. an. Dom. 1300. Literæ omnium nobilium Angliæ, &c. Papæ.

mage.

mage. His words are, "Sæpe dictus W. rex ligius homo noſter "deveniat de omnibus terris de quibus anteceſſores ſui ante ceſ- "ſorum noſtrorum ligei homenes fuerunt, et nobis atque hære- "dibus noſtris fidelitatem jurarunt." Rymer vol. 1. p. 65. Theſe general terms were probably copied from the uſual form of the homage itſelf.

It is no proof that the kings of Scotland poſſeſſed no lands nor baronies in England, becauſe we cannot find them in the imperfect hiſtories and records of that age. For inſtance, it appears clearly from another paſſage of this very letter of Richard, that the Scottiſh king had lands both in the county of Huntingdon and elſewhere in England; though the earldom of Huntingdon itſelf was then in the perſon of his brother, David; and we know at preſent of no other baronies, which William held. It cannot be expected that we ſhould now be able to ſpecify all his fees which he either poſſeſſed or claimed in England; when it is probable that the two monarchs themſelves and their miniſters, would at that very time have differed in the liſt: the Scottiſh king might poſſeſs ſome, to which his right was diſputed; he might claim others, which he did not poſſeſs: and neither of the kings was willing to reſign his pretenſions by a particular enumeration.

A late author of great induſtry and learning, but full of prejudices, and of little or no penetration, (Mr. Carte,) has taken advantage of the undefined terms of the Scots homage, and has pretended that it was done for Lothian and Galloway, that is, all the territories of the country now called Scotland, lying ſouth of the Clyde and Forth. But, to refute this pretenſion at once, we need only conſider, that if theſe territories were held in fee of the Engliſh kings, there would, by the nature of the feudal law as eſtabliſhed in England, have been continual appeals from them to the courts of the lord paramount; contrary to all the hiſtories and records of that age. We find, that, as ſoon as Edward really eſtabliſhed his ſuperiority, appeals immediately commenced from all parts of Scotland: and that king, in his writ to the king's-bench, conſiders them as a neceſſary conſequence of the feudal tenure. Such large territories alſo would have ſupplied a conſiderable part of the Engliſh armies, which never could have eſcaped all the hiſtorians. Not to mention that there is not any inſtance of a Scots priſoner of war being tried as a rebel, in the many hoſtilities between the kingdoms, where the Scots armies were chiefly filled from the ſouthern counties.

Mr. Carte's notion with regard to Galloway, which comprehends in the language of that age, or rather in that of the preceeding, moſt of the ſouth-weſt counties of Scotland; his no-

tion

tion reſts on ſo ſlight a foundation, that it ſcarce merits being refuted. He will have it (and merely becauſe he will have it) that the Cumberland, yielded by king Edmund to Malcolm I. meant not only the county in England of that name, but all the territory northwards to the Clyde. But the caſe of Lothian deſerves more conſideration.

It is certain, that, in every antient language, Scotland means only the country north of the firths of Clyde and Forth. The ſouthern country was divided into Galloway and Lothian; and the latter comprehended all the ſouth-eaſt counties. This territory was certainly a part of the antient kingdom of Northumberland, and was entirely peopled by Saxons, who afterwards received a great mixture of Danes among them. It appears from all the Engliſh hiſtories, that the whole kingdom of Northumberland paid very little obedience to the Saxon monarchs, who governed after the diſſolution of the heptarchy; and the northern and remote parts of it ſeem to have fallen into a kind of anarchy, ſometimes pillaged by the Danes, and ſometimes concurring with them in their ravages upon other parts of England. The kings of Scotland, lying nearer them, took at laſt poſſeſſion of their country, which had ſcarce any government, and we are told by Matthew of Weſtminſter, p. 193, that king Edgar made a grant of the territory to Kenneth III. that is, he reſigned claims, which he could not make effectual, without beſtowing on them more trouble and expence than they were worth: for theſe are the only grants of provinces made by kings; and ſo ambitious and active a prince as Edgar would never have given preſents of any other kind. Though Matthew of Weſtminſter's authority may appear ſmall with regard to ſo remote a tranſaction; yet we may admit it in this caſe, becauſe Ordericus Vitalis, a very good authority, tells us, p. 701. that Malcolm acknowledged to William Rufus, that the conqueror had confirmed to him the former grant of Lothian. But it follows not, becauſe Edgar made this ſpecies of grant to Kenneth, that therefore he exacted homage for that territory. Homage and all the rites of the feudal law were very little known to the Saxons; and we may alſo ſuppoſe, that the claim of Edgar was ſo antiquated and weak, that, in reſigning it, he made no very valuable conceſſion, and Kenneth might well refuſe to hold, by ſo precarious a tenure, a territory, which he at preſent held by the ſword. In ſhort, no author ſays, he did homage for it.

The only colour indeed of authority for Mr. Carte's notion is, that Matthew Paris, who wrote in the reign of Henry III. before Edward's claim of ſuperiority was heard of, ſays that Alexander III. did homage to Henry III. *pro Laudiano et aliis terris.* See page 555. This word ſeems naturally to be interpreted

preted Lothian. But in the first place, Matthew Paris's testimony, though considerable, will not outweigh that of all the other historians, who say that the Scot's homage was always done for lands in England. Secondly, if the Scot's homage was done in general terms (as has been already proved) it is no wonder that historians should differ in their account of the object of it, since the parties themselves were not fully agreed. Thirdly, there is reason to think that *Laudianum* in Matthew Paris does not mean Lothian in Scotland. There appears to have been a territory, which antiently bore that or a similar name, in the north of England. For (1) the Saxon chroniele, p. 197. says that Malcolm Kennure met William Rufus in Lodene in England. (2) It is agreed by all the historians, that Henry II. only reconquered from Scotland the northern counties of Northumberland, Cumberland and Westmorland. See Newbrigg's, p. 383. Wykes, p. 30. Hemingford, p. 492. Yet the same country is called by other historians Loidis, comitatus Lodonensis, or some such name. See M. Paris, p. 68. M. West. p. 247. Annal. Waverl. p. 159. and Diceto, p. 531. (3) This last mentioned author, when he speaks of Lothian in Scotland, calls it Loheneis, p. 574. though he had called the English territory Loidis. (4) King David's charter to the church of Durham, begins with this passage: "Omnibus Scotis et Anglis, tam in Scotia, "quam in Ledoneis constitutis, &c." See Spellman Gloss. in verbo Scotia. Whence we may learn, that the province of Lodoneium was not only situated south of the Tweed, but also extended beyond Durham, and made a part of England. Hume.

NOTE [C] p. 231.

However great the difficulties which seemed to obstruct, the long intended and projected union, they were nevertheless, in the end, intirely done away, and the great work, most happily effected. This was accomplished at a period subsequent to the time of sir Matthew Hale;—In 1707—6 Anne;—when twenty-five articles of union were agreed to by the parliaments of both nations; the purport of the most considerable being,

That on the first of May 1707, and for ever after, the kingdoms of England and Scotland, should be united into one kingdom, by the name of Great Britain.

That the succession to the monarchy of Great Britain should be the same as was before settled with regard to that of England.

That the united kingdom should be represented by one parliament.

That

That there ſhould be a communication of all rights and privileges between the ſubjects of both kingdoms, except where otherwiſe agreed.

That when England raiſes 2,000,000 *l.* by a land-tax, Scotland ſhould raiſe 48,000 *l.*

That the ſtandards of the coin, of weights, and of meaſures, ſhould be reduced to thoſe of England.

That laws relating to trade, cuſtoms, and the exciſe, ſhould be the ſame in Scotland as in England. But that all the other laws of Scotland ſhould be in force; ſubject to alteration by the parliament of Great Britain: with this caution however, that laws relative to the public policy are alone ſubjugated to parliamentary interference; laws relating to private right not being to be altered unleſs for the evident utility of the people of Scotland.

Sixteen peers are to be choſen to repreſent the peerage of Scotland in parliament, and forty-five members to ſit in the houſe of commons.

The ſixteen peers to have all privileges of parliament; and all peers of Scotland to be peers of Great Britain, and to have all the privileges of peers, except ſitting in the houſe of lords and voting on the trial of a peer.

Theſe are the principal of the twenty-five articles of union, againſt ſome of which, however, the lords North and Grey, Rocheſter, Howard, Leigh, Buckingham and Guildford, in form proteſted. "We humbly conceive, (ſay the proteſting peers) "that the ſum of forty-eight thouſand pounds to be charged "on the kingdom of Scotland, as the quota of Scotland, for "a land-tax, is not proportionable to the aid granted by the "parliament of England: but if, by reaſon of the preſent circumſtances of that kingdom, it might have been thought it "was not able to bear a greater proportion, at this time, yet "we cannot but think it unequal to this kingdom, that it ſhould "be agreed, that when the four ſhillings aid ſhall be enacted by "the parliament of Great Britain to be raiſed on land in England, that the forty-eight thouſand pounds now raiſed in "Scotland ſhall never be increaſed in time to come; though the "trade of that kingdom ſhould be extremely improved, and "conſequently the value of their land proportionably raiſed, "which in all probability it muſt do, when this union ſhall "have taken effect."——"And we humbly conceive, that the "number of ſixteen peers of Scotland is too great a proportion to "be added to the peers of England, who very rarely conſiſt of "more than one hundred attending lords in any one ſeſſion of parliament, and for that reaſon, we humbly apprehend, ſuch a "number as ſixteen may have a very great ſway in the reſolutions of this houſe, of which the conſequences cannot now be foreſeen:

" foreſeen: in the next place, we conceive, the lords of Scot-
" land, who, by virtue of this treaty, are to ſit in this houſe, be-
" ing not qualified as the peers of England are, muſt ſuffer a di-
" minution of their dignity to ſit here on ſo different foundati-
" ons; their right of ſitting here depending intirely on an elec-
" tion, and that from time to time, during the continuance of
" one parliament only; and at the ſame time, we are humbly of
" opinion, that the peers of England who ſit here by creation
" from the crown, and have a right of ſo doing in themſelves, or
" their heirs, by that creation for ever, may find it an alteration
" in their conſtitution, to have lords added to their number, to
" ſit and vote in all matters brought before a parliament, who
" have not the ſame tenure of their ſeats in parliament as the
" peers of England have." Die Jovis 27° Feb. 1706.

By the ſtatute 5 Ann. c. 8. the articles of union are ratified and confirmed. In this ſtatute there are alſo two acts of parliament recited; the one of Scotland, whereby the church of Scotland, and alſo the four univerſities of that kingdom, are eſtabliſhed for ever, and all ſucceeding ſovereigns are to take an oath inviolably to maintain the ſame; the other of England, 5 Ann. c. 6. whereby the acts of uniformity of 13 Eliz. and 13 Car. II. (except as the ſame had been altered by parliament at that time) and all other acts then in force for the preſervation of the church of England, are declared perpetual; and it is ſtipulated, that every ſubſequent king and queen ſhall take an oath inviolably to maintain the ſame within England, Ireland, Wales, and the town of Berwick upon Tweed.

And it is enacted, that " theſe two acts, ſhall for ever be " obſerved as fundamental and eſſential conditions of the union."

Upon theſe articles, and act of union, it is to be obſerved, firſt, that, the two kingdoms are now ſo inſeparably united, that nothing can ever diſunite them again; except the mutual conſent of both, or the ſucceſsful reſiſtance of either, upon apprehending an infringement of thoſe points which, when they were ſeperate and independent nations, it was mutually ſtipulated ſhould be " fundamental and eſſential conditions of the union." (*a*)

Secondly,

(*a*) It may juſtly be doubted, (ſays Blackſtone) whether even ſuch an infringement (though a manifeſt breach of good faith, unleſs done upon the moſt preſſing neceſſity) would of itſelf diſſolve the union: for the bare idea of a ſtate, without a power ſomewhere veſted to alter every part of it's laws, is the heighth of political abſurdity. The truth ſeems to be, that in ſuch an *incorporate union* (which is well diſtinguiſhed by a very learned prelate from a fœderate alliance, where ſuch an infringement would certainly reſcind the compact) the two

Secondly, that whatever elſe may be deemed "fundamental and "eſſential conditions," the preſervation of the two churches of England and Scotland, in the ſame ſtate that they were in at the time of the union, and the maintenance of the acts of uniformity, which eſtabliſh our common prayer, are expreſly declared ſo to be. Thirdly, that therefore any alteration in the conſtitution of either of thoſe churches, or in the liturgy of the church of England, (unleſs with the conſent of the reſpective churches, collectively or repreſentatively given) would be an infringement of theſe "fundamental and eſſential conditions," and greatly endanger the union. Fourthly, that the municipal laws of Scotland are ordained to be ſtill obſerved in that part of the iſland, unleſs altered by parliament; and, as the parliament has not yet thought proper, except in a few inſtances, to alter them, they ſtill (with regard to the particulars unaltered) continue in full force. Wherefore the municipal or common laws of England are, generally ſpeaking, of no force or validity in Scotland. (*b*)

Thus were united two kingdoms, which, by their ſituation, ſhould ſeem to have been deſtined for the formation of one great and powerful monarchy. And by this ſolemn junction of its whole native force, Great Britain hath riſen to an eminence and to an authority in Europe, which England and Scotland could never have attained. By this happy medium, two nations have been incorporated and rendered one people; the diſtinctions which had ſubſiſted for many ages gradually wear away;—peculiarities diſappear; the ſame manners prevail in both parts of the iſland; the ſame entertainments are frequented by the elegant and the polite; and the ſame ſtandard of taſte, and the ſame parity in language, is eſtabliſhed.

Thoſe

two contracting ſtates are totally annihilated, without any power of revival: and a third ariſes from their conjunction, in which all the rights of ſovereignty, and particularly that of legiſlation, muſt of neceſſity reſide. (See Warburton's alliance, 195.) But the wanton, or imprudent exertion of this right would probably raiſe a very alarming ferment in the minds of individuals; and therefore ſuch an attempt might *endanger* (though by no means deſtroy) the union.

To illuſtrate this matter a little farther: an act of parliament to repeal or alter the act of uniformity in England, or to eſtabliſh epiſcopacy in Scotland, would doubtleſs in point of authority be ſufficiently valid and binding; and, notwithſtanding ſuch an act, the union would continue unbroken. Nay, each of theſe meaſures might be ſafely and honourably purſued, if reſpectively agreeable to the ſentiments of the Engliſh church, or the kirk in Scotland. But it ſhould ſeem neither prudent, nor perhaps conſiſtent with good faith, to venture upon either of thoſe ſteps, by a ſpontaneous exertion of the inherent powers of parliament, or at the inſtance of mere individuals. Blac. Com. 1 v. 97.

(*b*) Blac. Com. 1 v. 96.

Thoſe who are deſirous of knowing the origin and the conſtitution of the parliament in Scotland before the union of the two kingdoms in the reign of Ann, and of the change made by the eſtabliſhment of one parliament for Great Britain, may conſult the treatiſe on the laws of election for Scotland, with which Mr. Wright hath obliged the public.

CHAP. XI.

Touching the courſe of DESCENTS *in* England.

AMONG the many preferences that the laws of England have above others, I ſhall ſingle out TWO PARTICULAR TITLES, which are of common uſe, wherein their preference is very viſible; and the due conſideration of their excellence therein, may give us a handſome indication, or ſpecimen, of their excellencies above other laws, in other parts or titles, of the ſame alſo.

The titles, or capitula legum, which I ſhall ſingle out for this purpoſe, are theſe two, viz. firſt the hereditary tranſmiſſion of lands from anceſtor to heir, and the certainty thereof; and ſecondly, the manner of trial BY JURY; which, as it ſtands at this day ſettled in England, together with the circumſtances and appendixes thereof, is certainly THE BEST MANNER OF TRIAL IN THE WORLD; and I ſhall herein give an account of the ſucceſſive progreſs of thoſe capitula legis, and what growth they have had in ſucceſſion of time, till they arrived to that ſtate and perfection which they have now obtained.

Firſt, then, touching deſcents and hereditary tranſmiſſions. It ſeems by the laws of the Greeks and Romans, that the ſame rule was held both in relation to lands and goods, where they were not otherwiſe diſpoſed of by the anceſtor, which the Romans therefore called SUCCESSIO AB INTESTATO; but the cuſtoms of particular countries, and eſpecially here in England, do put a great difference, and direct a SEVERAL method in the tranſmiſſion of goods or chattels, and that of the inheritances of LANDS.

Now as to hereditary tranſmiſſions or ſucceſſions, commonly called with us DESCENTS, I ſhall hold this order in my diſcourſe, viz.

Firſt, I ſhall give ſome ſhort account of the ancient laws of the Jews, the Greeks, and the Romans, touching this matter.

Secondly, I ſhall obſerve ſome things, wherein it may appear, how the particular cuſtoms, or municipal laws, of

other countries varied from thoſe laws, and the laws HERE formerly uſed.

Thirdly, I ſhall give ſome account of the rules and laws of deſcents, or hereditary tranſmiſſions, as they FORMERLY ſtood, and as at this day they ſtand in England; with the ſucceſſive alterations, that proceſs of time, and the wiſdom of our anceſtors, and certain cuſtoms grown up, TACITLY, GRADUALLY, and SUCCESSIVELY, have made therein.

And firſt, touching the laws of ſucceſſion, as well of deſcent of inheritances of lands, as alſo of goods and chattels; which, among the Jews, was the ſame in both.

Mr. Selden, in his book, De Succeſſionibus apud Hebræos, has given us an excellent account, as well out of the holy text, as out of the comments of the rabbins, or Jewiſh lawyers, touching the ſame; which you may ſee at large in the fifth, ſixth, ſeventh, twelfth and thirteenth chapters of that book; and which, for ſo much thereof as concerns my preſent purpoſe, I ſhall briefly comprize under the eight following heads, viz. (*a*)

Firſt, that in the deſcending line, the deſcent, or ſucceſſion, was to ALL the ſons; only the ELDEST ſon had a DOUBLE portion, to any one of the reſt; viz. if there were three ſons, the eſtate was to be divided into four parts, of which the eldeſt was to have two fourth parts, and the other two ſons were to have one fourth part each.

Secondly, if the ſon died in his father's life-time, then THE GRANDSON, and ſo, in infinitum, ſucceeded in the portion of his father, as if his father had been in poſſeſſion of it, according to the jus repreſentationis NOW IN USE HERE.

Thirdly, the daughter did NOT ſucceed in the inheritance of the father, AS LONG AS THERE WERE SONS, OR ANY DESCENDANTS FROM SONS IN BEING;—but, if any of the ſons died in the life-time of his father HAVING DAUGHTERS, but WITHOUT SONS, the daughters ſucceeded in HIS part, as if he himſelf had been poſſeſſed.

Fourthly, and in caſe the father left only daughters and no ſons, THE DAUGHTERS EQUALLY SUCCEEDED, to

(*a*) Vide Numb. ch. 27. and ſee Blac. Com. 2 v. 213.

their father, as in COPARTNERSHIP; without any prelation, or preference, of the eldeſt daughter, to two parts, or a double portion.

Fifthly, but if the ſon had purchaſed an inheritance, and died without iſſue, LEAVING A FATHER AND BROTHERS, the inheritance of ſuch ſon ſo dying, did NOT deſcend to the brothers, (unleſs in caſe of the next brother's taking to wife the deceaſed's widow to raiſe up children to his deceaſed brother)—but in ſuch caſe, THE FATHER INHERITED to ſuch ſon entirely.

Sixthly, but if the father in that caſe was dead, then it came to the brothers, as it were, AS HEIRS TO THE FATHER; in the ſame manner as if the father had been actually poſſeſſed thereof; and therefore the father's other ſons and their deſcendants, in infinitum, ſucceeded; but yet eſpecially, and WITHOUT ANY DOUBLE PORTION TO THE ELDEST; becauſe though in truth the brothers ſucceeded, as it were, in right of repreſentation FROM THE FATHER, yet if the father died BEFORE the ſon, the deſcent was DE FACTO immediately from the brother deceaſed, to the other brothers; IN WHICH CASE their law gave NOT a double portion; and in caſe the father had no ſons, or deſcendants from them, then it deſcended to ALL THE SISTERS.

Seventhly, if the ſon died without iſſue, and his father, or any deſcendants from him, were extant, it went NOT to the grandfather, or his other deſcendants; but if the father was dead without iſſue, then it deſcended to the grandfather; and if he were dead, then it went to HIS ſons and their deſcendants; and for want of them, then to HIS DAUGHTERS or their deſcendants, as if the grandfather himſelf had been actually poſſeſſed and had died; and ſo mutatus mutandus, to the proavus, abavus, atavus, &c. and their deſcendants.

Eighthly, but the inheritance of the ſon, NEVER RESORTED TO THE MOTHER, or to any of her anceſtors; but both ſhe, and they, were TOTALLY EXCLUDED from the ſucceſſion.

The double portion, therefore, that was jus primogenituræ, never took place but in that perſon that was the primogenitus

mogenitus of him from whom the inheritance IMMEDIATELY deſcended; or HIM that repreſented him;—as if A. had two ſons, B. and C.—and B. the ELDEST had two ſons, D. and E.—and then B. died,—whereas B. ſhould have had a double portion, viz. two thirds IN CASE HE HAD SURVIVED HIS FATHER;—but now this double portion ſhall be EQUALLY divided between D. and E.—and D. ſhall NOT have two thirds of the two thirds, that deſcended from A. to them. Vide Selden, ut ſupra.

Thus much of the laws, or rules, touching deſcents among the Jews.

Among the Græcians, (*b*) the laws of deſcents in ſome ſort reſemble thoſe of the Jews, and in ſome things they differed. Vide Petit's Leges Attica, cap. 1. tit. 6. De Teſtamentis & Hereditario Jure, where the text of their law runs thus, viz.

" Omnes legitimi filii hæreditatem paternam ex æquo
" inter ſe hæriſcunto, ſi quis inteſtatus moritur relictis
" filiabus qui eas in uxores ducunt hæredes ſunto, ſi nullæ
" ſuperſint, hi ab inteſtato hæreditatem cernunto: et
" primo quidem fratres defuncti Germani, & legitimi fra-
" trum filii hæreditatem ſimul adeunto; ſi nulli fratres aut
" fratrum filii ſuperſint, iis geniti eadem lege hæreditatem
" cernunto: maſculi autem iis geniti etiam ſi remotiori
" cognationis ſint gradu, præferuntor, ſi nulli ſuperſint,
" paterni proximi, ad ſobrinorum uſque filios, materni de-
" functi propinqui ſimili lege hæreditatem adeunto; ſi e
" neutra cognatione ſuperſint intra definitum graduni
" proximus cognatus paternus, addito notho nothave;
" ſuperſtite legitima filia nothus hæreditatem patris ne
" adito."

This law is VERY OBSCURE; but the ſenſe thereof ſeems to be briefly this, viz. that all the ſons EQUALLY ſhall inherit to the father; but if he have no ſons, then the huſbands of the daughters; and if he have no children, then his brothers and their children; and if none, then his

(*b*) At leaſt among the Athenians—ſee Blac. Com. 2 v. 213. and Pot. Archæ. Græca, l. 4. c. 15.

next kindred on the part of his father, PREFERRING THE MALES BEFORE THE FEMALES; and if none of the father's line, ad ſobrinorum uſque filios, then to deſcend to the mother's line. Vide Petit's Gloſs thereon.

Among the Romans it appears, that the laws of ſucceſſions, or deſcents, DID SUCCESSIVELY VARY; for the laws of the twelve tables, did exclude the females from inheriting, and had many other ſtreightneſſes and hardſhips, which were ſucceſſively remedied: firſt, by the emperor Claudius, and after him by Adrian, in his ſenatus conſultus Tertullianus; and after him by Juſtinian in his third inſtitutes, tit. De Hæreditatibus quæ ab inteſtato deferuntur, and the two enſuing titles. And again, all this was further explained and ſettled by the novel conſtitutions of the ſaid Juſtinian, ſtiled the Authenticæ Novellæ, cap. 18. De Hæreditatibus ab inteſtato venientibus & agnatorum jure ſublato. Therefore omitting the large inquiry into the ſucceſſive changes of the Roman law in this particular, I ſhall only ſet down how, according to that conſtitution, the Roman law ſtands ſettled therein. [A]

Deſcents or ſucceſſions from any perſon are of three kinds, viz. firſt, in the deſcending line. Secondly, the aſcending line. Thirdly, the collateral line; and this latter is either IN AGNATOS A PARTE PATRIS, or IN COGNATOS A PARTE MATRIS. [B]

Firſt, in the deſcending line, theſe rules are by the Roman law directed, viz.

Firſt, the deſcending line, whether male or female, whether immediate or remote, takes place; and prevents the deſcent or ſucceſſion, aſcending or collateral, in infinitum.

Secondly, the remote deſcents of the deſcending line ſucceed IN STIRPEM, i. e.—in that right which the parent SHOULD HAVE HAD.

Thirdly, this deſcent, or ſucceſſion, IS EQUAL in all the daughters, all the ſons, and all the ſons and daughters, WITHOUT PREFERRING THE MALE BEFORE THE FEMALE; —ſo that if the common anceſtor had three ſons, and three daughters; EACH of them HAD A SIXTH PART; and if one of them had died in the life of the father, having three

three ſons and three daughters, the ſixth part that belonged TO THAT PARTY, ſhould have been divided EQUALLY BETWEEN HIS or her ſix CHILDREN; and ſo in infinitum in the deſcending line.

Secondly, in the aſcending line, there are theſe two rules, viz.

Firſt, if the ſon dies WITHOUT ISSUE, or any deſcending from him, having a father and a mother living; BOTH OF THEM SHALL EQUALLY SUCCEED to the ſon, and prevent all others of the collateral line, except brothers and ſiſters; and if only a father, or only a mother, he or ſhe ſhall ſucceed ALONE.

Secondly, but if the deceaſed leaves a father and a mother, WITH A BROTHER AND A SISTER, ex utriſque parentibus conjuncti; they all four ſhall EQUALLY SUCCEED to the ſon, by equal parts, without preference of the males.

Thirdly, in the collateral line, i. e. where the perſon dies WITHOUT father or mother, ſon or daughter, or any deſcending from them IN THE RIGHT LINE—the rules are theſe, viz.

Firſt, the brothers and ſiſters, EX UTRISQUE PARENTIBUS CONJUNCTI, and the IMMEDIATE children of them, ſhall ſucceed EQUALLY, without preference of either ſex; and the children from them ſhall ſucceed IN STIRPES;—as if there be a brother and ſiſter, and the ſiſter dies in the life of the deſcendant, leaving one or more children; all ſuch children ſhall ſucceed IN THE MOIETY, that SHOULD HAVE COME to their deceaſed mother, had ſhe ſurvived.

Secondly, but if there be NO brothers or ſiſters, EX UTRISQUE PARENTIBUS CONJUNCTI; nor any of their immediate children,—then the brothers and ſiſters of the HALF blood, and their immediate children, ſhall ſucceed IN STIRPES to the deceaſed,—without any prerogative to the male.

Thirdly, but if there be no brothers or ſiſters of the whole, or half blood; nor any of their immediate children

—(for the grandchildren are not provided for by the law) then the NEXT KINDRED are called to the inheritance.

(But, by the author's leave, [adds a preceding editor] I think the grandchildren are impliedly provided for, as they ſucceed their father or mother jure repreſentationis.)

Fourthly, and if the next kindred be in an EQUAL degree, whether on the part of the father as AGNATI, or on the part of the mother as COGNATI, then they are EQUALLY called to the inheritance, and ſucceeded IN CAPITA, and not IN STIRPES.

Thus far of the ſettled laws of the Jews, Greeks, and Romans; but the particular, or municipal laws, and cuſtoms of almoſt every country derogate from thoſe laws, and direct ſucceſſions in a much different way. For inſtance,

By the cuſtoms of Lombardy, according to which the rules of the feuds, both in their deſcents and in other things, are much directed; their deſcents are in a much different manner, viz.

Leges feudarum, lib. 1. tit. 1. if a feud be granted to one brother, who dies without iſſue, it deſcends NOT to his other brother, UNLESS IT BE SPECIALLY PROVIDED FOR IN THE FIRST INFEUDATION. If the donee dies, having iſſue ſons and daughters, it deſcends ONLY TO THE SONS;—whereas by the Roman law it deſcends to both: the brother ſucceeds not to the brother unleſs ſpecially provided for. Ibid. tit. 50. The aſcendants ſucceed NOT, but only the deſcendants; neither does a daughter (c) ſucceed NISI EX PACTO, VEL NISI SIT FEODUM FŒMINEUM. [C]

If we come nearer home, to the laws of Normandy, lands there are of two kinds, viz. PARTIBLE, and NOT PARTIBLE. The lands that are partible, are valvaſories, burgages and ſuch like, which are much of the nature of our ſocage lands; theſe deſcend to ALL the ſons, or to all the daughters. Lands NOT partible, are FIEFS AND DIGNITIES;—they deſcend to the ELDEST SON, and not to all

(c) It was one reaſon given in the feudal law, for the excluſion of daughters, *quia filiae ſervitia praeſtare non poſſunt.* But ſee Blac. Com. 2 v. 214. and Sulliv. Lect. xiv.

the

the ſons; but if there be NO ſons, then to all the daughters, and become partible.

The rules and directions of their deſcents are as follow, viz.

Firſt, for want of ſons or nephews, it deſcends to the daughters; if there be no ſons or daughters, or deſcendants from them, it goes to brothers; and for want of brothers, to ſiſters;—obſerving as before the difference between lands partible and not partible;—and accordingly the deſcent runs to the poſterity of brothers TO THE SEVENTH DEGREE. If there be no brothers, nor ſiſters, nor any deſcendants from them WITHIN the ſeventh degree, IT DESCENDS TO THE FATHER; and if the father be dead, then to the uncles and aunts, and their poſterity, (as above is ſaid in the caſe of brothers and ſiſters) and if there be none, then to the grandfather.

So that, according to their law, the father is POSTPONED to the brother and ſiſter, and their iſſues, but is PREFERRED before the uncle. According to the Jewiſh law, the father is preferred before the brother; by the Roman law, he ſucceeds together, equally, with the brother; but by the Engliſh law, the father CANNOT take from his ſon by an IMMEDIATE deſcent; but may take AS HEIR TO HIS BROTHER; who was heir to his ſon by collateral deſcent.

Secondly, if lands deſcended from the part of the father, they could never reſort by a deſcent, to the line of the mother; but in caſe of purchaſes BY THE SON, who died without iſſue; for want of heirs of the part of the father, it deſcended to the heirs of the part of the mother, according to the law of England.

Thirdly, the ſon of the ELDEST ſon, who died in the life of the father, is preferred before a YOUNGER ſon, SURVIVING his father; as the law ſtands here now ſettled, though it had ſome interruption, 4 Johannis. (*d*)

Fourthly, on equality of degrees in collateral deſcents, the male line is preferred before the female.

(*d*) Vide poſt. note (*g*), and ſee Blac. Com. 2 vol. 220. and Sulliv. Lect. xxxvi.

Fifth-

Fifthly, although by the civil law,—fratres ex utroque parente conjuncti præferuntur fratribus conſanguineis tantum vel uterinis;—yet it ſhould ſeem by the Contumier of Normandy,—fratres conſanguineis ei ex eodem patre ſed diverſa matre,—ſhall take by deſcent, together with the brothers, EX UTROQUE CONJUNCTI, upon the death of any ſuch brothers. But quere hereof, for this ſeems a miſtake; for, as I take it, the half blood HINDERS THE DESCENT between brothers and ſiſters, by their laws, as well as ours.

Sixthly, LEPROSY was amongſt them an impediment of ſucceſſion; but then it ſeems it ought to be firſt ſolemnly adjudged ſo by the ſentence of the church.

Upon all this, and much more that might be obſerved upon the cuſtoms of ſeveral countries, it appears, that the rules of ſucceſſions, or hereditary tranſmiſſions, have been various in ſeveral countries, according to their various laws, cuſtoms, and uſages.

And now, after this brief ſurvey of the laws and cuſtoms of other countries, I come to the laws and uſages of England in relation to deſcents; and the growth that thoſe cuſtoms have ſucceſſively had, and whereunto they are now arrived.

Firſt, touching hereditary ſucceſſions. It ſeems, that according to the ancient Britiſh laws, the eldeſt ſon inherited THEIR EARLDOMS AND BARONIES; for they had great dignities and juriſdictions annexed to them, and were in nature of principalities; but that their ORDINARY FREEHOLDS, deſcended to ALL their ſons; and this cuſtom they carried with them into Wales, whither they were driven. This appears by Statutum Walliæ, 12 E. I. and which runs thus, viz.

" Aliter uſitatum eſt in Wallia quam in Anglia quoad " ſucceſſionem hæreditatis; eo quod hæreditas partibilis " eſt inter hæredes maſculos, & a tempore cujus non ex- " titerit memoria partibilis extitit. Dominus rex non vult " quod conſuetudo illa abrogetur; ſed quod hæreditates " remaneant partibiles, inter conſimiles hæredes ſicut eſſe " conſueverunt; & fiat partitio illius ſicut fieri conſuevit. " Hoc excepto baſtardi non habeant de cætero hæreditates

" &

" & etiam quod non habeant purpartes, cum legitimis nec " ſine legitimis." (*e*)

Whereupon three things are obſervable, viz. Firſt, that at this time, the hereditary ſucceſſion of the eldeſt ſon, was then KNOWN to be the common and uſual law in England. Secondly, that the ſucceſſion of all the ſons was the ancient CUSTOMARY LAW among the Britiſh in Wales, which by this ſtatute was continued to them. Thirdly, that before this time, baſtards were admitted to inherit in Wales, as well as the legitimate children; which cuſtom is thereby abrogated: and although we have but few evidences touching the Britiſh laws before their expulſion hence into Wales, yet this uſage in Wales ſeems ſufficiently to evidence THIS, to have been the ancient Britiſh law.

Secondly, as to the times of the Saxons and Danes. Their laws, collected by Brompton and Lambard, ſpeak not much concerning the courſe of deſcents; yet it ſeems that COMMONLY, deſcents of their ORDINARY lands at leaſt, except baronies and royal inheritances, deſcended alſo to ALL the ſons: (*f*) for amongſt the laws of king Canutus, in Mr Lambard, (*g*) is this law, viz. N° 68. " Sive " quis incuria ſive morte repentina fuerit inteſtato mortuus, " dominus tamen nullam rerum ſuarum partem (præter " eam quæ jure debetur hereoti nomine) ſibi aſſumito. " Verum eas judicio ſuo uxori, liberis & COGNATIONE " PROXIMIS juſte (pro ſuo cuique jure) diſtributio."

Upon which law, we may obſerve theſe five things, viz.

Firſt, that the wife had a ſhare, as well of the lands, for her dower, as of the goods.

Secondly, that, in reference to hereditary ſucceſſions, there then ſeemed to be little difference between lands and goods; for this law makes no diſtinction.

Thirdly, that there was a kind of ſettled right of ſucceſſion, with reference to proximity and remoteneſs of

(*e*) Vide ante, cap. 9. and note [B] on that chapter.

(*f*) Blackſtone ſays, that the Danes ſeem to have made no diſtinction of ſexes, but to have admitted all the children at once to the inheritance.—And, in ſupport of the aſſertion, he cites the very law of Canute, which ſir Matthew Hale has thought proper to tranſcribe. Vide Blac. Com. 2 v. 215. Hale ſays the ſame in his fourth obſervation on this law.

(*g*) Fo. 122, 123.

blood,

blood, or kin,——Et cognatione proximis pro ſuo cuique jure.

Fourthly, that, in reference to children, THEY ALL SEEMED TO SUCCEED ALIKE, without any diſtinction between males and females.

Fifthly, that yet the anceſtor might diſpoſe of, BY HIS WILL, as well lands as goods; which uſage ſeems to have obtained here unto the time of Henry II. as will appear hereafter. Vide Glanville.

Thirdly, it ſeems that, until the conqueſt, the deſcent of lands was at leaſt to ALL the ſons alike; and, for ought appears, TO ALL THE DAUGHTERS ALSO; and that there was NO difference in the hereditary tranſmiſſion of lands and goods, at leaſt in reference to THE CHILDREN. (*b*) This appears by the laws of king Edward the confeſſor, confirmed by king William I. and recited in Mr. Lam-

(*b*) The law of the Saxons on the continent (which was probably brought over hither, and firſt altered by the law of Canute) gives an evident preference of the male to the female ſex. "Pater aut mater, defuncti, filio non filiae haereditatem relinquent ..... Qui defunctus non filios ſed filias reliquerit, ad eas omnis haereditas pertinant." Tit. 7. ſect. 1. 4. It is poſſible therefore, in the opinion of Mr. juſtice Blackſtone, that this preference might be a branch of that imperfect ſyſtem of feuds, which obtained here before the conqueſt; eſpecially as it ſubſiſts among the cuſtoms of gavelkind, and as, in the charter or laws of king Henry the firſt, it is not (like many Norman innovations) given up, but rather enforced. The true reaſon (continues this learned commentator) of preferring the males muſt be deduced from feodal principles: for, by the genuine and original policy of that conſtitution, no female could ever ſucceed to a proper feud, inaſmuch as they were incapable of performing thoſe military ſervices, for the ſake of which that ſyſtem was eſtabliſhed. Blac. Com. 2 v. 214. For the true diſtinction between proper and improper feuds, ſee Wright's ten. cap. 1. *paſſim*. The ſucceſſion of all the ſons equally to the father, was not only the antient feudal law, but, as it ſhould ſeem, the law of England in the time of the Saxons; the relicts of which remain in the gavelkind of Kent. Sulliv. lect. XIV. and ſee Robinſon's Treat. on gavelkind, which is an elaborate diſſertation on the origin, antiquity and univerſality of partible deſcents. The author purſues his ſubject amongſt the Jews, the Greeks, and the Romans, afterwards amongſt moſt of the modern nations in Europe, and then proceeds to inquire into the ſtate of our own law of deſcents anterior to the conqueſt. For the etymon of gavelkind, and the properties of this ſpecies of tenure, ſee Wright's Ten. 207, 208, 209, &c.

bard,

bard, folio 167. as alſo by Mr. Selden in his notes upon Eadmerus, viz. Lege 36. tit. De Inteſtatorum Bonis; pag. 184.—Si quis inteſtatus obierit, liberi ejus hæreditatem æqualiter divident.

But this equal diviſion of inheritances among all the children was found to be very inconvenient: for,

Firſt, it weakened the ſtrength of the kingdom; for by frequent parcelling and ſubdividing of inheritances, in proceſs of time they became ſo divided and crumbled, that there were few perſons of ABLE eſtates, left to undergo PUBLIC charges and offices.

Secondly, it did by degrees bring the inhabitants to a low kind of country living; and FAMILIES WERE BROKEN; and the younger ſons, which, had they not had thoſe little parcels of land to apply themſelves to, would have betaken themſelves to trades, or to civil or military, or eccleſiaſtical employments, (*i*) neglecting thoſe opportunities, wholly applied themſelves to thoſe ſmall diviſions of lands; whereby they neglected the opportunities of greater advantage, of enriching themſelves and the kingdom.

And therefore king William I. having by his acceſſion to the crown gotten into his hands the poſſeſſions and demeſnes of the crown, and alſo very many and great poſſeſſions of thoſe that oppoſed him, or adhered to Harold, diſpoſed of thoſe lands, or great part of them, to his countrymen, and others that adhered to him; and reſerved certain honorary tenures, either by baronage, or in knights ſervice, or grand ſerjeancy, (*k*) FOR THE DEFENCE OF THE KINGDOM; and poſſibly alſo even at the deſire of many of the owners, changed their former tenures into knights ſervice; which INTRODUCTION OF NEW TENURES, was nevertheleſs not done WITHOUT CONSENT OF PARLIAMENT; as appears by the additional laws before mentioned, which king William made by advice of parliament, mentioned

(*i*) Theſe reaſons occaſioned an almoſt total change in the method of feodal inheritances abroad; ſo that the eldeſt male began univerſally to ſucceed to the whole of the lands in all military tenures; and in this condition the feodal conſtitution was eſtabliſhed in England by William the conqueror. Blac. Com. 2 v. 215.

(*k*) See Wright's Tenures, and Sulliv. Lect.

by

by Mr. Selden in his notes on Eadmerus, page 191. amongſt which this was one, viz.

" Statuimus etiam & firmiter præcipimus ut omnes co-
" mites barones milites & ſervientes & univerſi liberi ho-
" mines totius regni noſtri habeant & teneant ſe ſemper in
" armis & in equis ut decet & oportet, & quod ſint ſem-
" per prompti & bene parati ad ſervitium ſuum integrum
" nobis explendendum & peragendum, cum ſemper opus
" fuerit ſecundum quod nobis de feodis debent & tenentur
" tenementis ſuis de jure facere & ſicut illis ſtatuimus per
" commune concilium totius regni noſtri, et illis dedimus &
" conceſſimus in feodo jure hæreditario.——" (*l*)

Whereby it appears, that there were two kinds of military proviſions; one that was ſet upon all freeholds by common conſent of parliament, and which was uſually called ASSISA ARMORUM; and another that was conventional and by tenure, UPON THE INFEUDATION OF THE TENANT, and which was uſually called knights ſervice; and ſometimes royal, ſometimes foreign ſervice, and ſometimes ſervitium loricæ.

And hence it came to paſs, that not only by the cuſtoms of Normandy, but alſo according to the cuſtoms of other countries, thoſe HONORARY fees, or infeudations, became deſcendible to THE ELDEST, and not to all the males. And hence alſo it is, that in Kent, where the cuſtom of ALL THE MALES taking by deſcent, generally prevails, and who pretend a conceſſion of all their cuſtoms by the conqueror, to obtain a ſubmiſſion to his government, according to that romantic ſtory of their moving wood: yet even in Kent itſelf, thoſe ANCIENT tenements or fees, that are held ANCIENTLY by KNIGHTS SERVICE, are deſcendible to the ELDEST SON; as Mr. Lambard has obſerved to my hands in his Peranibulation, page 533, 553. out of 9 Hen. III. Fitz. Preſcription, 63. 26 Hen. VIII. 5. and the ſtatute of 31 Hen. VIII. cap. 3. And yet even in Kent, if gavelkind lands eſcheat, or come to the crown by attainder or diſſolution of monaſteries, and be granted to be held by

(*l*) Vide ante, page 95, 107.

knights

knights ſervice, or per baronium,—the cuſtomary deſcent is NOT changed;—neither can it be, but by act of parliament; for it is a cuſtom FIXED TO THE LAND.

But thoſe honorary infeudations made in ancient times, eſpecially ſhortly after the conqueſt, did SILENTLY AND SUDDENLY, ASSUME THE RULE OF DESCENTS TO THE ELDEST, and accordingly held it; and ſo although poſſibly there were no acts of parliament of thoſe elder times, at leaſt none that are now known of, for altering the ancient courſe of deſcents from all the ſons to the eldeſt, yet the uſe of the neighbouring country might introduce the ſame uſage here, as to thoſe HONORARY poſſeſſions.

And becauſe thoſe honorary infeudations were many, and ſcattered almoſt through all the kingdom, in a little time they introduced A PARITY, in the ſucceſſion of lands of OTHER tenures; as ſocages, valvaſories, &c. So that without queſtion, BY LITTLE AND LITTLE, almoſt generally in all counties of England (except Kent, who were moſt tenacious of their old cuſtoms in which they gloried; —and ſome particular feuds and places where a contrary uſage prevailed) the generality of deſcents or ſucceſſions, by little and little, AS WELL OF SOCAGE LANDS AS KNIGHTS SERVICE, went to the ELDEST ſon, (*m*) according to the declaration of king Edward I. in the ſtatute of Wales above-mentioned, as will more fully appear by what follows.

In the time of Henry I.—as we find by his ſeventieth law, it ſeems that the whole land did NOT deſcend to the eldeſt ſon, but begun to look a little that way, viz. PRIMUM PATRIS FEUDUM, PRIMOGENITUS FILIUS HABEAT. And as to collateral deſcents, that law determines thus: "ſi "quis ſine liberis deceſſerit pater aut mater ejus in hære-"ditatem ſuccedat vel frater vel ſoror ſi pater & mater de-"ſint, ſi nec hos, habeat ſoror patris vel matris, & dein-"ceps in quintum geniculum; qui cum propinquiores in "parentela ſint hæreditario jure ſuccedant; & dum virilis

(*m*) See Wright's Ten 49, 175. Com. 2 v. 214, 215. and vide ante and Sull. Lect. xiv. and Blac. cap. 5.

"ſexus

"ſexus extiterit & hæreditas ab inde ſit, fœminea non hæ-
"reditetur." (*n*)

By this law it ſeems to appear;

Firſt, the eldeſt ſon, though he had jus primogenituræ, the principal fee of his father's land, yet he had not ALL the land.

Secondly, that for want of children, the father or mother inherited, before the brother or ſiſter.

Thirdly, that for want of children, and father, mother, brother, and ſiſter, the land deſcended to the uncles and aunts TO THE FIFTH GENERATION.

Fourthly, that in ſucceſſions collateral, PROXIMITY of blood was preferred.

Fifthly, that the male was preferred before the female, i. e. the father's line was preferred before the mother's, UNLESS THE LAND DESCENDED FROM THE MOTHER, and then the mother's line was preferred.

How this law was obſerved in the interval between Henry the firſt and Henry the ſecond, we can give no account of; but the next period that we come to is, the time of Henry II. wherein Glanville gives us an account how the law ſtood at that time. Vide Glanville, lib. 7. Wherein, notwithſtanding it will appear, that there was ſome UNCERTAINTY AND UNSETTLEDNESS IN THE BUSINESS OF DESCENTS, or hereditary ſucceſſions; though it was much better poliſhed than formerly. The rules THEN of ſucceſſion, were either in reference to goods, or lands.

As to goods, one third part thereof went to the wife, another third part went to the children, and the other third was left to the diſpoſition of the teſtator; but if he had no wife, then a moiety went to the children, and the other moiety was at the deceaſed's diſpoſal. And the like rule if he had left a wife, but no children. Glanv. lib. 7. cap. 5. & vide lib. 2. cap. 29. (*o*)

(*n*) Vide ante cap. 7. and Lambard, ut ſupra.

(*o*) As to the diſtribution of inteſtates effects as now eſtabliſhed in this kingdom, ſee 22 and 23 Car. 11. c. 10. and 1 Jac. 11. c. 17. and Blac. Com. 2 v. 515. 4 v. 408, 424, 439.

But

But as to the ſucceſſion of lands, the rules are theſe.

Firſt, if the lands were KNIGHTS SERVICE, they generally went to the ELDEST SON; and in caſe of no ſons, then to ALL the daughters; and in caſe of no children, then to the eldeſt brother.

Secondly, if the lands were SOCAGE, they deſcended to ALL the ſons to be divided; (*p*) SI FUERIT SOCCAGIUM ET ID ANTIQUITUS DIVISUM; only the chief houſe was to be allotted to the purparty of the eldeſt, and a compenſation made to the reſt in lieu thereof:—"Si vero non fuerit antiquitus diviſum, tunc primogenitus ſecundum quorundam conſuetudinem totam hæreditatem obtinebit, ſecundum autem quorundam conſuetudinem poſtnatus filius hæres eſt." Glanville, lib. 7. cap. 3. So that although CUSTOM directed the deſcent VARIOUSLY, either to the eldeſt, or youngeſt, or to ALL the ſons, yet it ſeems that at this time, jus commune, or common right, ſpoke for THE ELDEST SON TO BE HEIR, no cuſtom intervening to the contrary.

Thirdly, as the ſon or daughter, ſo THEIR children, in infinitum, are PREFERRED in the deſcent, before the collateral line or uncles.

Fourthly, but if a man had two ſons, and the eldeſt ſon died in the life-time of his father, HAVING ISSUE, a ſon or daughter, and then the father dies; IT WAS THEN CONTROVERTED, whether the ſon or nephew ſhould ſucceed to the father; though THE BETTER OPINION ſeems to be for the NEPHEW. Glanvil. lib. 7. cap. 3.

Fifthly, a baſtard could not inherit. Ibid. cap. 13, or 17. And although by the canon or civil law, if A. have a ſon BORN of B. BEFORE marriage, and after A. marries B. —THIS SON SHALL BE LEGITIMATE AND HERITABLE: yet according to the laws of England then, and ever ſince uſed, he was NOT heritable. Glanvil. lib. 7. cap. 15.

(*p*) It is mentioned in the Mirror, as a part of our antient conſtitution, that knights fees ſhould deſcend to the eldeſt ſon, and ſocage fees ſhould be partible among the male children. Vide Mir. c. 1. ſect. 3. For the definition of a knight's fee, ſee Sulliv. Lect. pa. 188. As to ſocage, ſee Somner's Treat. of Gavel. 133, 141. Wright's Ten. 142. and Blac. Com. 2 v. 79. 4 v. 419.

Sixthly, in case the purchaser died without issue, the land descended to the brothers; and for want of brothers, to the sisters; and for want of them, to the children of the brothers or sisters; and for want of them, to the uncles; and so onward ACCORDING TO THE RULES OF DESCENTS AT THIS DAY; and the father, or mother, were NOT to inherit to the son, but the brothers or uncles, and THEIR children. Ibid. cap. 1 & 4.

And it seems, that in all things else the rules of descents, in reference to the collateral line, were MUCH THE SAME AS NOW; as namely, that if lands descended of the part of the father, it should NOT resort to the part of the mother, or e converso; but in the case of PURCHASERS, for want of heirs of the part of the father, IT RESORTED TO THE LINE OF THE MOTHER; and the nearer and more worthy of blood were preferred: so that if there were any of the part of the father, though never so far distant, it hindred the descent to the line of the mother, though much nearer.

But in those times it seems there were two impediments of descents, or hereditary successions, which do NOT NOW obtain, viz.

First, leprosy; if so adjudged by sentence of the church: this indeed I find not in Glanville; but I find it PLEADED AND ALLOWED in the time of king John; and thereupon the land was adjudged from the leprous brother, to the sister. Pasch. 4 Johannis.

Secondly, there was another curiosity in law, and it was wonderful to see how much and how long it prevailed; for we find it in use in Glanville, who wrote temp. Henry II. —in Bracton, temp. Henry III.—in Fleta, temp. Edward I. and in the broken year of 13 Edward I. Fitzh. Avowry 235.—"Nemo potest esse tenens & dominus, & homagium "repellit perquisitum."—And therefore if there had been THREE brothers, and the eldest brother had enfeoffed the second, RESERVING HOMAGE,—AND HAD RECEIVED HOMAGE,—and then the second had died without issue;—the land should have descended to the YOUNGEST brother, and not to the eldest brother, "quia homagium repellit per-"quisitum," as it is here said; for he could not pay homage

mage to himſelf. Vide for this, Bracton, lib. 2. cap. 30, Glanvil. lib. 7. cap. 1. Fleta, lib. 6. cap. 1.

But at this day the law is ALTERED, and ſo it has been, for ought I can find, ever ſince 13 Edw. I. Indeed, it is ANTIQUATED, rather than altered, and the fancy upon which it was grounded has appeared trivial; for if the eldeſt ſon enfeoff the ſecond, reſerving homage, and that homage paid, and then the ſecond ſon dies without iſſue, it will deſcend to the eldeſt AS HEIR, and the ſeigniory is extinct. It might indeed have had ſome colour of reaſon to have examined, "whether he might not have WAIVED "the deſcent, in caſe his ſervices had been more beneficial "than the land:"—but there could be little reaſon from thence to exclude him from the ſucceſſion. I ſhall mention no more of this impediment, nor of that of leproſy, for that they both are vaniſhed and antiquated long ſince; and, as the law now is, NEITHER OF THESE ARE ANY IMPEDIMENT OF DESCENTS.

And now, paſſing over the time of king John and Richard I.—becauſe I find nothing of moment therein on this head, unleſs the uſurpation of king John upon his eldeſt brother's ſon, which he would fain have juſtified, by INTRODUCING a law of preferring the younger ſon before the nephew, deſcended from the elder brother. But this pretenſion could no way juſtify his uſurpation, as has been already ſhewn in the time of Henry II. (q)

Next, I come to the time of Henry III. in whoſe time the tractate of Bracton was written, and thereby (in lib. 2. cap. 30. & 31. and lib. 5. cap. .) it appears, that there is ſo little variance as to point of deſcents between the law as it was taken, when Bracton wrote, and the law as afterwards taken in Edward the firſt's time, when Britton and Fleta wrote, that there is very little difference between them, as may eaſily appear by comparing Bracton ubi ſupra, & Fleta, lib. 5. cap. 9. lib. 6. cap. 1, 2. The latlatter ſeem to be only tranſcripts, or abſtracts of the former. Wherefore I ſhall ſet down the ſubſtance of what

(q) Vide ante, page 119. and ſee Blac. Com. 2 v. 220. Sulliv. Lect. xxxvi.

both ſay, and thereby it will appear, that the rules of deſcents in Henry the third and Edward the firſt's time were very much one.

Firſt, at this time the law ſeems to be unqueſtionably SETTLED, that the ELDEST ſon was, of common right, HEIR; not only in caſes of knight ſervice lands, but alſo of ſocage lands, (unleſs there were a ſpecial cuſtom to the contrary, as in Kent and ſome other places) and ſo that point of common law was fully ſettled. (r)

Secondly, that all the deſcendants, in infinitum, from any perſon that had been heir, if living, were inheritable JURE REPRESENTATIONIS; as the deſcendants of the ſon, of the brother, of the uncle, &c. And alſo,

Thirdly, that the eldeſt ſon dying in the life-time of the father, HIS ſon, or iſſue was to have the preference AS HEIR, to the father, before the younger brother; and ſo the doubt in Glanville's time was ſettled. Glanvil. lib. 7. cap. 3 "Cum quis autem moriatur habens filium poſtna-"tum, & ex primogenito filio præmortuo nepotem, mag-"na quidem juris dubitatio ſolet eſſe uter illorum prefe-"rendus ſit alii in illa ſucceſſioni, ſcilicet, utrum filius aut "nepos?"

Fourthly, the father, or grandfather, could not by law inherit IMMEDIATELY to the ſon.

Fifthly, leproſy, though it were an exception to a paintiff, becauſe he ought NOT to converſe in the courts of law, (as Bracton, lib. 5. cap 20.) yet we no where find it to be an impediment of a deſcent. (s)

So that, upon the whole matter, for any thing I can obſerve in them, the rules of deſcents THEN ſtood ſettled in ALL points, as they are AT THIS DAY; except ſome FEW matters, which yet, were ſoon after ſettled, as they now ſtand, viz.

Firſt, that impediment or hindrance of a deſcent, from him that did homage to him that received it, ſeems to have

(r) See Blac. Com. 2 v. 215. (s) See Fitzherbert, on the writ "de leproſo amovendo,"—234. D.

been

been yet in uſe; at leaſt till 13 Edw. I. and in Fleta's time for HE puts the caſe and ADMITS it.

Secondly, whereas both Bracton and Fleta agree, that HALF BLOOD to him that is a PURCHASER, is an impediment of a deſcent; yet in the caſe of a deſcent from THE COMMON ANCESTOR, half blood is NO impediment. As for inſtance; A. has iſſue B. a ſon and C. a daughter by one venter, and D. a ſon by another venter: if B. purchaſes in fee and dies without iſſue, it ſhall deſcend to the ſiſter, and not to the brother of the half blood; but if the land had deſcended from A. to B. and he had entred and died without iſſue, it was a doubt in Bracton and Britton's time, whether it ſhould go to the younger ſon, or to the daughter? but the law is ſince ſettled, that IN BOTH CASES IT DESCENDS TO THE DAUGHTER,—Et ſeiſina facit ſtipitem & primum gradum. Et poſſeſſio fratris de feodo ſimplici facit ſororem eſſe hæredem.

Thus upon the whole it ſeems, that abating thoſe ſmall and inconſiderable variances, the ſtates and rules of deſcents as they ſtood in the time of Henry the third, or at leaſt in the time of Edward the firſt, were reduced to their full complement and perfection; and vary nothing CONSIDERABLY from what they are at this day, and HAVE CONTINUED EVER SINCE THAT TIME.

I ſhall therefore ſet down the ſtate and rule of deſcents IN FEE-SIMPLE, as it ſtands at this day; without meddling with particular limitations of entails of eſtates, which VARY the courſe of deſcents in ſome caſes from the common rules of deſcents or hereditary ſucceſſions; and herein we ſhall ſee what the law has been and continued touching the ſame ever ſince Bracton's time, who wrote in the time of Henry the third, now above four hundred years ſince; and by that we ſhall ſee what alterations the ſucceſſion of time has made therein.

And now to give a ſhort ſcheme of the rules of deſcents, or hereditary ſucceſſions, of the LANDS of ſubjects, AS THE LAW STANDS AT THIS DAY, and has ſtood for above four hundred years paſt, viz.

All poſſible hereditary ſucceſſions may be diſtinguiſhed into theſe three kinds, viz. either,

First, in the deſcending line, as from father to ſon or daughter, nephew or niece, i. e. grandſon or granddaughter. Or,

Secondly, in the collateral line, as from brother to brother, or ſiſter, and ſo to brother and ſiſters children. Or,

Thirdly, in an aſcending line, either DIRECT, as from ſon to father or grandfather, (which is NOT admitted by the law of England,) [D.] or in the TRANSVERSAL line, as to the uncle or aunt, great-uncle or great-aunt, &c. And becauſe this line is again divided into the line of the father, or the line of the mother; this TRANSVERSE ASCENDING SUCCESSION, is either in the line of the father, grandfather, &c. ON THE BLOOD OF THE FATHER; or in the line of the mother, grandmother, &c. ON THE BLOOD OF THE MOTHER. The former are called AGNATI, the latter COGNATI. I ſhall therefore ſet down a ſcheme of pedigrees, as high as great grandfather and great-grandmothers grandſires, and as low as great-grandchild; which nevertheleſs will be APPLICABLE TO MORE REMOTE SUCCESSIONS with a little variation; and will explain the whole nature of deſcents, or hereditary ſucceſſions.

This pedigree, with its application, will give a plain account of all hereditary ſucceſſions under their ſeveral caſes and limitations, as will appear by the following rules, taking our mark, or epocha, from the FATHER and MOTHER.

But firſt, I ſhall premiſe certain GENERAL RULES, which will direct us much in the courſe of deſcents, as they ſtand here in England, viz.

First, in deſcents, THE LAW PREFERS THE WORTHIEST OF BLOOD: (*t*) as,

First, in all deſcents IMMEDIATE, the male is preferred before the female,—whether in ſucceſſions deſcending, aſcending, or collateral; therefore in deſcents, the ſon inhe-

(*t*) Or in other words ſons are admitted before daughters—As, if Caius hath two ſons, A. and B. and two daughters, C. and D. and dies;—firſt A. and (in caſe of his death without iſſue) then B. ſhall be admitted to the ſucceſſion in preference to both the daughters. Blac. Com. 2 v. 213.

The

The *PATERNAL* Line.				The *MATERNAL* Line.		
Tritavus, or Great-Grandfather's Great-Grandfather.				*Tritavia*, or Great-Grandmother's Great-Grandmother.		
Atavus, or Great-Grandfather's Grandfather.				*Atavia*, or Great-Grandmother's Grandmother.		
Abavus, or Great-Grandfather's Father.				*Abavia*, or Great-Grandmother's Mother.		
Proamita Magna. Gr. Great-Aunt.	*Propatruus Magnus.* Gr. Great-Uncle.	*Proavus.* Gr. Grandfather.		*Proavia*, or Gr. Grandmother.	*Proavunculus.* Gr. Great-Uncle.	*Promatertera Magna.* Great Great-Aunt.
Amita Magna. Great-Aunt.	*Patruus Magnus.* Great-Uncle.	*Avus*, or Grandfather.		*Avia*, or Grandmother.	*Avunculus Mag.* Great-Uncle.	*Matertera Magna.* Great-Aunt.
Amita, or Aunt.	*Patruus*, or Uncle.	*Pater*, or FATHER.	*Mater*, or MOTHER.		*Avunculus.* Mother's Brother.	*Martertera.* Mother's Sister.
Soror, his Sister.	*Frater*, his Brother.	*Filius Primus*; eldest Son.				
Nepos. Nephew.	*Neptis.* Niece.	*Nepos*, or Grandson.	*Neptis*, or Grand-daughter.			

Note, The descendants from all these six In the next degree, if Male, is called *Pronepos*, if Female, *Proneptis*, *i. e. Great Grandson*, or *Great Grand daughter*.

Consobrinus. A Mother's Brother's Son.

Consobrina. A Mother's Brother's Daughter.

Consobrinus. A Mother's Sister.

Consobrina. A Mother's Sister's Daughter.

rits and EXCLUDES(*u*) the daughter; the brother is preferred before the ſiſter; the uncle before the aunt.

Secondly, in all deſcents IMMEDIATE,—the DESCENDANTS FROM MALES ARE TO BE PREFERRED BEFORE THE DESCENDANTS FROM FEMALES. And hence it is, that the daughter of the eldeſt ſon is preferred, in deſcents from the father, before the ſon of the younger ſon; and the daughter of the eldeſt brother, or uncle, is preferred before the ſon of the younger; and the uncle, nay, the great-uncle, i. e. the grandfather's brother, ſhall inherit before the uncle of the mothers ſide.

Secondly, in deſcents, THE NEXT OF BLOOD IS PREFERRED BEFORE THE MORE REMOTE, though equally or more worthy. And hence it is,

Firſt, the ſiſter of the WHOLE blood, is preferred in deſcents, before the brother of the HALF blood; becauſe ſhe is more ſtrictly joined to the brother of the whole blood, viz. BY FATHER AND BY MOTHER, than the half brother, though otherwiſe he is the more worthy. (*x*)

Se-

(*u*) But our law does not extend to a total excluſion of females—it only poſtpones them to males; for, though daughters are excluded by ſons, yet they ſucceed before any collateral relations; our law ſteering a middle courſe, between the abſolute rejection of females, and the putting them on a footing with males. Blac. Com, 2 v. 214.

(*x*) The excluſion of the half blood by our law is variouſly accounted for—ſir Martin Wright conſiders it as a conſequence of the rules eſtabliſhed for reſtricting the ſucceſſion to the deſcendants of the firſt feudatory, in conformity with the ſtrict notion of feuds. Wright's Ten, 184. See alſo Blac. Law Tracts, v. 1. oct. 213. and his Com. 2 v. 224 to 234. where the feudal law is explained more at large, though the author admits that the practice goes much farther than the principle will warrant.—Some inſiſt that the reaſon why the brothers by different venters cannot inherit to each other, is the averſion our Saxon anceſtors had to ſecond marriages, which they are ſaid to have deemed, at beſt, but a permitted fornication. But this unfavourable idea of the *vota iterata* was not peculiar to the Saxons, or to any other deſcendants of the ancient Germans. Hargrave. See Tayl. Elem. Civ, L. 294. Lit. ſect 6. and Coke's comment.—But daughters by different femes, tho' they cannot inherit to each other, may inherit *together* to their father, becauſe the deſcent is IMMEDIATE from the father. Rob. diſc. on Inher. 37. Bro. Abr. Deſcent pl. 20. 1 Ro. Abr. 627. As to ſir Edward Coke's explanation of the term "*whole* blood" in 1 Inſt. 14. a. See 1 Sid. 200. and ſee alſo the

Secondly, becauſe the ſon, or daughter, being nearer than the brother; and the brother, or ſiſter, than the uncle; the ſon or daughter ſhall inherit, before the brother, or ſiſter, and they before the uncle.

Thirdly, that yet the father or grandfather, or mother or grandmother, in a DIRECT aſcending line, ſhall NEVER ſucceed IMMEDIATELY the ſon or grandchild; but the father's brother, or ſiſters, ſhall be preferred before the father himſelf; and the grandfather's brother, or ſiſters, before the grandfather: and yet upon a ſtrict account, the father is NEARER of blood to the ſon, than the uncle, yea than the brother; for the brother is of the blood of the brother, both deriving from the ſame parent, the common fountain of both their blood. And therefore the father at this day is preferred IN THE ADMINISTRATION OF THE GOODS, before the ſon's brother of the whole blood; and a remainder limited PROXIMO DE SANGUINE of the ſon, ſhall veſt in the father, before it ſhall veſt in the uncle. Vide Littleton, lib. 1. fol. 8, 10.

Thirdly, that all the deſcendants, from ſuch a perſon, as by the laws of England might have been heir to another, HOLD THE SAME RIGHT BY REPRESENTATION, as that common root from whence they are derived; (y) and therefore,

Firſt, they are in law in the SAME right of worthineſs and proximity of blood, as their root, THAT MIGHT HAVE BEEN HEIR, was, in caſe he had been living. And hence it is, that the ſon or grandchild, whether ſon or daughter of the eldeſt ſon, ſucceeds before the younger ſon; and the ſon or grandchild of the ELDEST brother, before the youngeſt brother; and ſo through all the degrees of ſucceſſion, BY THE RIGHT OF REPRESENTATION, THE RIGHT OF PROXIMITY IS TRANSFERRED FROM THE ROOT TO THE BRANCHES, and gives them the ſame preference as the next and worthieſt of blood,

the great argument of ſir Matthew Hale in the caſe of Collingwood and Pace 1 Vent. 413. See alſo 2 P. Wms. 667.

(y) That is, they ſtand in the ſame place as the perſon himſelf would have done, had he been living.

Se-

Secondly, this right transferred by repreſentation, is INFINITE AND UNLIMITED in the degrees of thoſe that deſcend from the repreſented; for filius the ſon, nepos the grandſon, abnepos the great-grandſon, and ſo in infinitum, ENJOY THE SAME PRIVILEGE OF REPRESENTATION AS THOSE FROM WHOM THEY DERIVE THEIR PEDIGREE HAD, whether it be in deſcents lineal or tranſverſal; and therefore the great-grandchild of the eldeſt brother, whether it be ſon or daughter, ſhall be preferred before the younger brother; becauſe though the female be LESS worthy than the male, yet ſhe ſtands in right of repreſentation of the eldeſt brother, who was more worthy than the younger. (z) And upon this account it is,

Thirdly, that if a man have TWO daughters, and the eldeſt dies in the life of the father, leaving ſix daughters, and then the father dies; THE YOUNGEST DAUGHTER SHALL HAVE AN EQUAL SHARE WITH THE OTHER SIX DAUGHTERS; becauſe they ſtand in repreſentation and ſtead of their mother, who could have had but a MOIETY.

Fourthly, that by the law of England, without a ſpecial cuſtom to the contrary, THE ELDEST ſon, or brother, or uncle, EXCLUDES THE YOUNGER; and the males in an equal degree do not all inherit: but ALL THE DAUGHTERS, whether by the ſame, or divers venters, do INHERIT TOGETHER TO THE FATHER;—and all the ſiſters, BY THE SAME VENTER, do inherit to the brother. (a)

(z) And theſe repreſentatives take neither more nor leſs, but juſt ſo much as their principals would have done.—This taking by repreſentation is called ſucceſſion *in ſtirpes*, according to the roots; ſince all the branches inherit the ſame ſhare that their root, whom they repreſent, would have done. Vide Blac. Com. 2 v. 217. The Jewiſh ſucceſſion was after the ſame manner.—Seld de Succ. Ebr. c. 1.—Though the Roman ſomewhat differed.—Nov. 110. c. 3. Inſt. 3. 1. 6. But ſee particularly Blac. Com. 2 v. 218 to 220.

(a) As if Caius hath two ſons A. and B. and two daughters C. and D. and dies;—A. his eldeſt ſon ſhall alone ſucceed to his eſtate, in excluſion of B. the ſecond ſon and both the daughters: but, if both the ſons die without iſſue before the father, the daughters C. and D. ſhall both inherit the eſtate as coparceners. Lit. Sec. 5. As to this right of primogeniture in males, ſee Blac. Com. 2 v. 214.—and ſee ſome of the notes on this chapter of deſcents, and the authorities there cited.

Fifth-

Fifthly, that THE LAST ACTUAL SEISIN IN ANY ANCESTOR, MAKES HIM AS IT WERE THE ROOT OF THE DESCENT, equally to many intents, as if he had been a purchaſer; and therefore he that cannot, according to the rules of deſcents, derive his ſucceſſion from him that was laſt actually ſeiſed, though he might have derived it from ſome precedent anceſtor, ſhall NOT inherit. (*b*) And hence it is, that where lands deſcend to the eldeſt ſon from the father, and the ſon enters and dies without iſſue; his ſiſter of the whole blood ſhall inherit AS HEIR to the brother, and not the younger ſon of the HALF blood; becauſe he cannot be heir to the brother of the half blood: (*c*) but if the eldeſt ſon had ſurvived the father, and died BEFORE ENTRY, the youngeſt ſon ſhould inherit AS HEIR TO THE FATHER; and not the ſiſter, becauſe he is heir to the father who was LAST ACTUALLY SEISED. And hence it is, that though the uncle is preferred before the father in deſcents to the ſon; yet if the uncle enter after the death of the ſon, and die without iſſue, the father ſhall inherit to the uncle, QUIA SEISINA FACIT STIPITEM.

Sixthly, that WHOSOEVER DERIVES A TITLE to any land, MUST BE OF THE BLOOD TO HIM THAT FIRST PURCHASED IT: (*d*) and this is the reaſon why, if the ſon PURCHASE lands and dies without iſſue, it ſhall deſcend to the heirs of the part OF THE FATHER; and if he has none, then to the heirs on the part of the mother; becauſe, though the ſon has both the blood of the father and of the mother in him, yet he is of the whole blood of the mother, and the conſanguinity of the mother are CONSANGUINEI COGNATI of the ſon. (*e*)

And

(*b*) "A man (ſaith ſir Edward Coke) that claimeth as heir in fee-ſimple to anie man by deſcent, muſt make himſelf heir to him that was laſt ſeiſed of the actuall freehold and inheritance." 1 Inſt. 11. b. See alſo 8 Co. 36. a; where 11 Hen. IV. 11. and 40 E. III. 9. are cited to prove this doctrine. And 1 Inſt. 14. b. 15. b. W. Jo. 361. Blac. Law Tr. oct. v. 1. 180. and Blac. Com. 2 v. 208 to 212. and 227, 228.

(*c*) See ante, note (*x*).

(*d*) The firſt purchaſer, *perquiſitor*, is he who firſt acquired the eſtate to his family, whether by ſale, or by gift, or by any other mode, except only that of deſcent.

(*e*) See Lit. Sec. 4. paſſim. and Co.

And of the other ſide, if the father had purchaſed lands and it had DESCENDED to the ſon, and the ſon had died without iſſue, and without any heir of the part OF THE FATHER,—it ſhould NEVER have deſcended in the line of the MOTHER, but eſcheated: for though the conſanguinei of the mother were the conſanguinei of the ſon, yet they were NOT of conſanguinity TO THE FATHER, who was THE PURCHASER: but if there had been none of the blood of the grandfather, yet it might have reſorted to the line of the GRANDMOTHER; becauſe HER conſanguinei, were as well of the blood of the father, as the mother's conſanguinity is of the blood of the ſon. Conſequently alſo, if the GRANDFATHER had purchaſed lands, and THEY HAD DESCENDED to the father, and from him to the ſon; if the ſon had entred and died without iſſue, HIS father's brothers, or ſiſters, or their deſcendants, or, for want of them, HIS great-grandfather's brothers, or ſiſters, or their deſcendants; or, for want of them, ANY OF THE CONSANGUINITY OF THE GREAT-GRANDFATHER, or brothers or ſiſters of the great-grandMOTHER, or their deſcendants, might have inherited; for THE CONSANGUINITY OF THE GREAT-GRANDMOTHER WAS THE CONSANGUINITY OF THE GRANDFATHER; but none of the line of the mother, or grandmother, viz. the grandfather's wife, ſhould have inherited, for that they were NOT of the blood of the firſt purchaſer. And the ſame rule e converſo holds in purchaſes in the line of the mother, or grandmother; they ſhall always keep in the SAME line that the firſt purchaſer ſettled them in.

But it is NOT neceſſary, that he that inherits be always heir TO THE PURCHASER; it is ſufficient if he be of HIS

Co. Lit. 12. a. with Hargrave's notes.—For an explication of the principle which governs this rule of deſcents, ſee Blac. Com. 2 v. 220 to 223. Sir Edw. Coke, in 1 Inſt. 13. a. ſays, "When lands DESCEND from the part of the father, the heires of the part of the mother ſhall never inherit."—But if the eldeſt ſon PURCHASES land, and it deſcends to the youngeſt ſon, and HE dies without heir of the part of the father, it ſhall deſcend to the heir on the part of the mother, becauſe they have one and the ſame mother. Harg. n. 5. on Co. Lit. 13. a. He cites Hal. MSS.—But ſee poſt, the ſixth rule of tranſverſal aſcending deſcents.

BLOOD,

BLOOD, and HEIR TO HIM that was LAST SEISED. The father purchaſes lands which deſcended to the ſon, who dies without iſſue, they ſhall never deſcend to the heir of the part of the ſon's MOTHER. But if the ſon's GRAND-MOTHER has a brother, and the ſon's GREAT-GRAND-MOTHER hath a brother, and there are NO OTHER kindred, they ſhall deſcend to the GRAND-MOTHER'S BROTHER; and yet, if the father had died without iſſue, HIS GRAND-MOTHER'S-BROTHER ſhould have been preferred, before his mother's brother; becauſe the former was heir OF THE PART OF HIS FATHER though a female, and the latter was only heir of the part of his mother. But where the ſon is once SEISED, and dies without iſſue, HIS GRAND-MOTHER'S BROTHER IS TO HIM HEIR OF THE PART OF HIS FATHER, and being nearer than his great grandmother's brother, is preferred in the deſcent.

But note, this is always intended ſo long as the line of deſcent is not broken; for if the ſon ALIEN thoſe lands, and then REPURCHASE them again in FEE; then the rules of deſcents are to be obſerved, as if he were the original PURCHASER, and as if it had been in the line of the father or mother.

Seventhly, in all ſucceſſions, as well in the line deſcending, tranſverſal, or aſcending, THE LINE THAT IS FIRST DERIVED FROM A MALE ROOT HAS ALWAYS THE PREFERENCE.

Inſtances whereof in the line DESCENDING, &c. viz.

A. has iſſue two ſons, B. and C.—B. has iſſue a ſon and a daughter, D. and E.—D. the ſon, has iſſue a daughter F.—and E. the daughter, has iſſue a ſon G.—Neither C. nor any of HIS deſcendants, ſhall inherit, ſo long as there are ANY deſcendants from D. and E.—and neither E. the daughter, nor any of HER deſcendants, ſhall inherit, ſo long as there are ANY deſcendants from D. the ſon, whether they be male or female.

So in deſcents COLLATERAL, as brothers and ſiſters; the ſame inſtances applied thereto, evidence the ſame concluſions.

But

But in ſucceſſions in the line ASCENDING, there muſt be a fuller explication, becauſe it is darker and more obſcure; I ſhall therefore ſet forth the whole method of TRANSVERSAL ASCENDING DESCENTS under the eight enſuing rules, viz.——

Firſt, if the ſon purchaſes lands in fee-ſimple, and dies without iſſue, thoſe of the male line aſcending, USQUE INFINITUM ſhall be preferred in the deſcent, ACCORDING TO THEIR PROXIMITY OF DEGREE TO THE SON; and therefore, the father's brothers and ſiſters, and their deſcendants, ſhall be preferred before the brothers, of the grandfather and their deſcendants; and if the father had no brothers nor ſiſters, the grandfather's brothers and their deſcendants; and for want of brothers, HIS ſiſters and their deſcendants, ſhall be preferred before the brothers of the great grandfather. For although by the law of England the father or grandfather cannot IMMEDIATELY inherit to the ſon, yet the direction of the deſcent to the COLLATERAL ASCENDING LINE, is as much, as if the father or grandfather had been, by law, inheritable; and therefore as in caſe the father had been inheritable, and ſhould have inherited to the ſon before the grandfather, and the grandfather, before the great grandfather; and conſequently if the father had inherited and died without iſſue, his eldeſt brother and his deſcendants ſhould have inherited before the younger brother and his deſcendants; and if he had no brothers but ſiſters, the ſiſters and their deſcendants ſhould have inherited before his uncles or the grandfather's brothers and their deſcendants. So though the law of England EXCLUDES the father from inheriting, yet it ſubſtitutes and directs the deſcent as it ſhould have been, had the father inherited, viz. IT LETS IN THOSE FIRST THAT ARE IN THE NEXT DEGREE TO HIM. (*f*)

Secondly, the ſecond rule is this: that the line of the part of the MOTHER ſhall never inherit, AS LONG AS THERE ARE ANY, THOUGH NEVER SO REMOTE, OF THE LINE OF

(*f*) See Year-book M. 12 Edw. 2. Brook, ibid. 38. and Blac. IV. 14. Fitz. Abr. tit. Diſcent Com. 2 v. 223.

THE

THE PART OF THE FATHER; and therefore, though the mother has a brother, yet if the atavus or atavia patris—i. e. the great-great-great-grandfather, or great-great-great-grandmother of the father—has a brother or a ſiſter, he or ſhe ſhall be preferred, and exclude the mother's brother, though he is much nearer.

Thirdly, but yet further. The MALE line of the part of the father ASCENDING, ſhall IN ÆTERNUM exclude the female line of the part of the father aſcending; and therefore in the caſe propoſed of the ſon's PURCHASING lands and dying without iſſue, the ſiſter of the father's grandfather, or of his great-grandfather, and ſo IN INFINITUM ſhall be preferred before the FATHER'S MOTHER'S BROTHER; tho' the father's mother's brother be a male, and the father's grandfather or great-grandfather's ſiſter be a female, and more remote; becauſe SHE IS OF THE MALE LINE, which is more worthy than the female line, though the female line be alſo of the blood of the father.

Fourthly, but as in the male line aſcending, THE MORE NEAR is preferred before the more remote; ſo in the female line DEſcending (g),—ſo it be OF THE BLOOD OF THE FATHER,—it is preferred before the more remote. The ſon therefore PURCHASING lands, and dying without iſſue; and the father, grandfather, and great-grandfather, and ſo upward, ALL THE MALE LINE BEING DEAD WITHOUT any brother or ſiſter, or ANY DESCENDING from them;—but the father's mother has a ſiſter or brother; and alſo the father's grandmother, has a brother, and likewiſe the father's great-grandmother has a brother. Though it is true, that ALL THESE ARE OF THE BLOOD OF THE FATHER; and though the very remoteſt of them, ſhall EXCLUDE the ſon's mother's BROTHER; and though it be alſo true, that the great-grandmother's blood has paſſed through more males of the father's blood, than the blood of the grandmother

(g) Qu. if it ſhould not be "in the female line" ASCENDING—not DESCENDING.—See Plowd. 450. in the caſe of Clere and Brook. And note Hale, in the concluſion of this fourth rule of "tranſverſal ASCENDING deſcents."

or,

or, mother of the father; yet, in this caſe, THE FATHER'S MOTHER'S SISTER SHALL BE PREFERRED before the father's grandmother's brother,—or the great-grandmother's brother,—becauſe THEY are all in the FEMALE line, viz. cognati and not agnati; and the father's mother's ſiſter is the NEAREST; and therefore ſhall have the preference; as well as in the male line ASCENDING, the FATHER'S brother, or HIS ſiſter, ſhall be preferred before the grandfather's brother.

Fifthly, but yet in the laſt caſe, where the ſon purchaſes lands and dies without iſſue, and without any heir on the part of the grandfather, the lands ſhall deſcend to the grandmother's brother or ſiſter, as heir on the part of his father; yet, if the FATHER had PURCHASED this land and died, and it DESCENDED to his ſon, who died without iſſue; the lands ſhould NOT have deſcended to the father's mother's brother or ſiſter, for the reaſons before given in the third rule. But for want of brothers or ſiſters of the grandfather, great-grandfather, and ſo upwards in the male ASCENDING line, it ſhould deſcend to the father's grandmother's brother, or ſiſter; WHICH IS HIS HEIR OF THE PART OF HIS FATHER;—who ſhould be preferred before the father's mother's brother, who is in truth, the heir OF THE PART OF THE MOTHER, of the purchaſer, though the next heir of the part of the father of him that LAST DIED SEISED: and therefore, as if the father that was the purchaſer had died without iſſue, the heirs of the part of the father, whether of the male or female line, ſhould have been preferred before the heirs of the part of the mother; ſo the ſon, WHO STANDS NOW IN THE PLACE OF THE FATHER, and inherits to him primarily, in his father's line, dying without iſſue, the ſame devolution and hereditary ſucceſſion ſhould have been, as if his father had immediately died WITHOUT ISSUE;—which ſhould have been to his grandmother's brother, as heir OF THE PART OF THE FATHER, though by the female line, and not to his mother's brother, who was only heir of the part of his MOTHER, and who is not to take till the father's line both male and female BE SPENT.

Sixth-

Sixthly, if the ſon PURCHASES lands and dies without iſſue, and IT DESCENDS to any heir, of the part of the father; THEN if the line of the father, AFTER ENTRY AND POSSESSION fail, it ſhall NEVER return to the line of the mother; (*b*) though in the FIRST inſtance, or firſt deſcent from the ſon, IT MIGHT have deſcended to the heir of the part of the mother. For by this deſcent and ſeiſin IT IS LODGED IN THE FATHER'S LINE, to whom the heir of the part of the mother can NEVER derive a title as heir, but it ſhall rather eſcheat. But if the heir, of the part of the father had NOT ENTRED, and THEN THAT line had failed, it might have deſcended to the heir, of the part of the mother AS HEIR TO THE SON, to whom immediately, for want of heirs of the part of the father, it might have deſcended.

Seventhly, and upon the ſame reaſon, if it had ONCE DESCENDED, to the heir of the part of the father of the grandfather's line, and THAT heir had ENTRED; it ſhould never deſcend to the heir of the part of the father of the grandMOTHER's line; becauſe the line of the grandmother was NOT of the blood, or conſanguinity of the line of the grandMOTHER's ſide. (*i*)

Eighthly, if for default of heirs of the purchaſer, of the part of the father, the lands DESCEND to the line of the mother;—the heirs of the mother, of the part of HER FATHER'S SIDE, ſhall be preferred in the ſucceſſion, before her heirs of the part of her MOTHER's ſide;—becauſe they are THE MORE WORTHY.

And thus the law ſtands in point of deſcents, or hereditary ſucceſſions, in England at this day; and has ſo ſtood and continued for above four hundred years paſt; as, by what has before been ſaid, may eaſily appear. And note, the moſt part of the eight rules and differences above ſpecified and explained, may be collected out of the reſolutions

(*b*) But ſee note (*e*) ante, page 267.

(*i*) All the editions have it "grandMOTHER's ſide"——but quære, if it ſhould not be "grandFATHER's ſide."

in the caſe of Clere v. Brook, &c. in Plowden's Commentaries, folio 444. (*k*)

(*k*) See Blackſtone's ſtate of this caſe. Com. 2 v. 238 who controverts, and that with great propriety, an opinion, which ſir Matthew Hale, ſhould ſeem to have adopted, in conſequence of the doctrine laid down, *arguendo*, by juſtice Mawoode in that caſe. And here it may in general ſuffice to obſerve, that inheritable blood is wanting to ſuch who are not related to the perſon laſt ſeiſed—to maternal relations in paternal inheritances, and *vice verſa*—to kindred of the half blood—to monſters—baſtards—aliens, and their iſſue—to perſons attainted of treaſon or felony, and to papiſts, in reſpect of themſelves only, by the ſtatute law.—Perſons ſo circumſtanced, are excluded from taking by deſcent; and in conſequence, the eſtate in the language of the law, "eſcheats" or falls to the lord of the fee. See Blac. Com. l. 2. c. 15. *paſſim*.

ADDI

ADDITIONAL NOTES

TO THE

ELEVENTH CHAPTER.

NOTE [A] p. 246.

THE preference of males to females ſhould ſeem to be totally unknown to ſuch of the laws of Rome, as are at preſent extant.

" Cum filius filiave (ſays the emperor) et ex altero filio nepos " neptiſve exiſtunt, pariter ad hæreditatem avi vocantur, nec, " qui gradu proximior eſt, ulteriorem excludit: æquum enim " eſſe videtur, nepotes nepteſve in patris ſui locum ſuccedere. " Pari ratione et ſi nepos neptiſve ſit ex filio, et ex nepote prone- " pos proneptiſve, ſimul vocantur. Et, quia placuit, nepotes " nepteſve, item pronepotes pronepteſve, in parentis ſui locum " ſuccedere, conveniens eſſe viſum eſt, non in capita, ſed in " ſtirpes, hæreditatem dividi; ut filius partem dimidiam hære- " ditatis habeat, et ex altero filio duo plureſve nepotes alteram " dimidiam. Item, ſi ex duobus filiis nepotes nepteſve exiſtant, " ex altero unus aut duo forte, ex altero tres aut quatuor, ad " unum aut duos dimidia pars pertineat, ad tres vel quatuor " altera dimidia. Inſt. lib. 3. t. 1. §. 6. 15.

Item ex duobus filiis.] By the civil law, repreſentation takes place in infinitum in the right line deſcending; and therefore it follows, according to that law, that, when any perſon dies, leaving grandchildren by ſons or daughters, who died in his life time, ſuch grandchildren, though equal in degree and unequal in their number in regard of their reſpective ſtocks, will divide the eſtate of their grandfather *per ſtirpes*, i. e. according to their ſtocks; for example, if Titius dies worth nine hundred *aurei*, and inteſtate, leaving only grandchildren by three ſons, already dead,—e. g. three grandchildren by one ſon, five by another and ſix by another, then each of theſe claſſes of grandchildren would be intitled to a third; that is, to three hundred aurei, no regard being paid to that claſs, in which there were moſt perſons. In hoc caſu, (ſays Vinnius,) maxime conſpicua eſt vis repræſentationis; licet enim omnes hic pari gradu ſint, ut proprio ſinguli jure ſuc-

cedere poſſe videantur, tamen poſtquam ſemel placuit, nepotes in locum patris ſui demortui, aliave ratione exuti jure ſui hæredis, ſuccedere, non debuit hoc jus ex accidenti aliquo variari, puta ut ſoli nepotes ex diverſis filiis et numero inæquales, ceu pauciores cum pluribus ex hac vel illa ſtirpe concurrentes, in capita hæreditatem dividerent—Cod. 6. t. 55. l. 2. Quare ſic in univerſum recte definiemus, deſcendantes ex maſculis omnes, qui ſunt diverſarum ſtirpium, quantumvis ejuſdem omnes gradus, in ſtirpes, non in capita, ſuccedere.

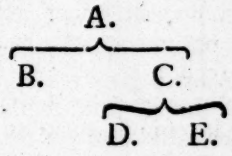
The ſucceſſion into the eſtates of inteſtates, was one of the moſt uncertain points of the Roman law. Even the diſtribution, which had for ſome time prevailed took a different turn, and even that while the emperor was compiling his body of law; for the ſyſtem of the *novels* (the CXVIII. particularly) defeats the doctrine laid down in ſeveral of the titles of the third book of the inſtitutes, where the point was conſidered, and meant to be eſtabliſhed: with the novels, however, it ſettled, and the great rule of ſucceſſion among the Romans, *quoad* deſcendants, is comprized in theſe few reflexions:——that deſcendants, while they laſted, ſhould exclude all other relations whatſoever;——that there ſhould be no reſpect had to primogeniture; nor any preference in regard to ſex;——that there ſhould be no excluſion, even of the moſt remote degree: and laſtly, that the eſtate of the inteſtate ſhould make ſo many *general* ſhares, as there ſhould be diſtinct heads in his immediate deſcendants.

From hence it is obvious that inheritances could never revert, or be thrown upwards (inter aſcendentes), nor be turned aſide (inter collaterales), ſo long as any were to be found in the line of deſcendants, in infinitum. For the principle, upon which this ſucceſſion reſted, was the *jus repræſentationis*, which cannot be fairly or reaſonably imagined in any other line than in that, to which we give exiſtence. There is ſomething of ſucceſſive in the idea of repreſentation, ſomething which looks like keeping up an order or a ſeries; and though to brothers it may be applied in ſome ſenſe, to fathers and grandfathers it can be applied in little or none.

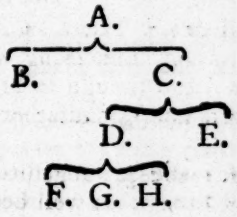
The diſregard of ſex and primogeniture, in which theſe people differed from moſt others, as well before, as after them, are of that arbitrary conſideration, that little remains to be obſerved upon that diſpoſition. But natural equity has a great ſtroke in the two laſt, and calls for ſome regard.

That deſcendants of the ſecond, third, or fourth degree, ſhould be raiſed to a kind of level with thoſe of the firſt, and not ſtand excluded, even while ſome of the firſt remain; and that children of a remote deſcent ſhould inherit along with the immediate one

is agreeable to truth and juſtice. The grandchildren, &c. of *Sempronius* by a ſon that is gone, ſtand to *Sempronius* in the place of that ſon. They would have had their ſhares through that father, if he had lived; and repreſent him therefore, or ſucceed to his rights, now he is removed. And hence, becauſe many children may ſucceed into one father's rights, it follows that the *jus repræſentationis*, which tranſmits the eſtate of Sempronius to his immediate deſcendants, ſhall undergo a conſiderable alteration in thoſe deſcents or generations that follow after. Though Sempronius may be repreſented by any number of children indifferently, and his eſtate cut into ſo many ſhares accordingly, yet will each of thoſe children be repreſented by their whole families; not by ſo many diſtinct heads of children, as Sempronius was, but by all their children collectively (let their number be what it will) laying as it were, their heads together to form one common ſtock. For all thoſe grandchildren *gregatim*, have that right in common, not ſeparate to each, which their father had to himſelf. And this is called *ſucceſſio in ſtirpes*; the other, when all ſhare alike, *in capita*. Thus in the ſcheme,



The eſtate of Sempronius (A.) will be divided into two equal parts, and B. and C. will each be heirs *ex ſemiſſe*. But ſuppoſing that C. is gone before his father, then ſhall B. ſtill be *heres ex ſemiſſe*, and D. and E. *ex quadrante*, each. Or put the caſe



That C. and D. ſhould each be gone, and D. be repreſented by F. G. and H.—then will B. as before, be *heres ex ſemiſſe*; E. *ex quadrante*, and F. G. and H. will ſucceed each of them *ex uncia*. Or put the caſe that E. is dead without iſſue alſo, then will F. G. and H. be each of them, *heres ex ſextante*. Vide Dr. Taylor's Elements of the Civil Law, 538. One of the moſt learned

and ingenious works of the preſent age. And as to the doctrine reſpecting aſcendants and collaterals, ſee id. 539. to 544. See alſo Domat's civil law, part II. lib. 2. tit. 1, 2, 3.

NOTE [B] p. 246.

Sunt autem agnati, (*a*) cognati per virilis ſexus cognationem conjuncti, quaſi a patre cognati: veluti frater ex eodem patre natus, fratris filius, nepoſve ex eo: item patruus et patrui filius, nepoſve ex eo: at, qui per fœminini ſexus perſonas cognatione junguntur, agnati non ſunt, ſed alias naturali jure cognati. Itaque amitæ tuæ filius non eſt tibi agnatus, ſed cognatus: et invicem tu illi eodem jure conjungeris: quia, qui ex ea naſcuntur, patris, non matris, familiam ſequuntur. Inſt. lib. 1. tit. 15. §. 1.

Sunt autem agnati, cognati per virilis ſexus perſonas cognatione conjuncti, quaſi a patre conati. (*b*) Itaque ex eodem patre nati fratres, agnati ſibi ſunt; qui et conſanguinei vocantur; nec requiritur, an etiam eandem matrem habuerint. Item patruus fratris filio, et invicem is illi, agnatus eſt. Eodem numero ſunt fratres patrueles, id eſt, qui ex duobus fratribus procreati ſunt, qui etiam conſobrini (*c*) vocantur. Qua ratione etiam ad plures gradus agnationis pervenire poterimus. Ii etiam, qui poſt mortem patris naſcuntur, jura conſanguinitatis nanciſcuntur. Non tamen omnibus ſimul agnatis dat lex hæreditatem; ſed iis qui tunc proximiore gradu ſunt, cum certum eſſe ceperit, aliquem inteſtatum deceſſiſſe. Inſt. lib. III. tit. II. §. 1. and ſee Dr. Taylor's Elements of the Civil Law, 314.

NOTE [C] p. 248.

As to the deſcent of inheritances by the feudal law, it may not be unneceſſary, in the firſt place, to obſerve, that feuds,

(*a*) The diſtinction between the *agnati* and *cognati*, is entirely taken away by Juſtinian. Nov. 118. cap. 4, 5.

(*b*) A patre conati] "cognatior eſt nomen generale; ſed non tantum generale; plerumque autem ſpeciale eſt, et proprium eorum, qui vel per fœminei ſexus perſonas conjunguntur vel capitis diminutione jura agnationis amiſerunt."

(*c*) Conſobrini] "Per abuſionem ſic dicti; conſobrini enim proprie ſunt, qui ex duabus ſororibus nati ſunt; ita dicti, quaſi conſororini." Theoph.

fiefs,

fiefs, or fees, were originally precarious, and held at the will of the lord. (*a*)

A precarious tenure during pleaſure, was not ſufficient to ſatisfy thoſe who held it; to attach them therefore to their ſuperior lord, they ſoon obtained the certainty of them for one year, (*b*) and afterwards for life; (*c*) but though feuds were not then hereditary, yet the vaſſals of feudal tenants were called *nativi*, as if born ſuch; and it was unuſual, and, whenever done, was thought hard, to reject the heir of the former feudatory, provided he was of ability to do the ſervices of the *feud*, and the lord had no juſt objection againſt him. (*d*) But though the lord did not remove the heir from the *feud*, yet it is not likely that he ſucceeded abſolutely as of courſe; but that he paid a fine, or made ſome acknowledgment, in the nature of *relief*, (*e*) for the removal of the feud; and though that was originally made in order to ſecure the ſucceſſion, which was then, in every ſenſe of the expreſſion, at the will of the lord; yet it was continued even after *feuds* be-

(*a*) Antiquiſſimo tempore ſic erat in dominorum poteſtate connexum, ut quando vellent, poſſent auferre rem in feudum a ſe datam. Feud. lib. 1. tit. 1. Statim ab initio originis feudorum in domini feudum concedentis poteſtate fuit, feudum conceſſum quandocunque vellet precarii inſtar, revocare. Hanneton de jure feud. 139. Som. Treat. of Gav. 108. Innumerable proofs might be added to thoſe produced in l'Eſprit des Loix, l. 30. c. 16. and by du Cange voc. *beneficium & feudum*.

(*b*) Poſtea vero eo ventum eſt ut per annum tantum firmitatem haberent. Feud. lib. 1. tit. 1. Deinde uſu inolevit ut per annum integrum feudum ſemel conceſſum firmitatem haberet. Hanneton de jure feud. 139.

(*c*) Deinde ſtatutum eſt ut uſq; ad vitam fidelis produceretur. Feud. lib. 1. tit. 1. Poſtea vero eo ventum eſt, ut ad recipientis vitam perduraret. Hanneton de jure feud. 139. Du Cange produces ſeveral quotations from antient charters and chronicles in proof of this. Gloſſ. voc. *Beneficium*.

(*d*) Licet hæreditaria ſucceſſio tum non erat in feudis, nativi tamen hi tenentes dicebantur ut apud nos hodie, quos niſi juſta offenſæ cauſa præceſſerit, et ad ſerviendum non ſufficerent, durum erat a ſuis poſſeſſionibus removere. Crag. de jure feud. 20, 21.

(*e*) Relevium eſt præſtatio hæredum, qui quum veteri jure feudali non poterant ſuccedere in feudis, caducam et incertam hæreditatem relevabant, ſoluta ſumma vel pecuniæ vel aliarum rerum pro diverſitate feudorum. Schilt. Cod. de bonis laudemialibus, ſect. 52. According to Hotoman, relevium dicitur honorarium, quod novus vaſallus patrono introitus cauſa largitur, quaſi morte alterius, vel alio quo caſu feudum ceciderit, quod jam a novo ſublevetur. Vide Hot. de verb. feudal. et Gloſſ. ad X. ſcriptores ad verb. Relevium.

came hereditary, (*f*) and is well known at this day (though by ſeveral names) in moſt countries.

Feuds were afterwards extended beyond the life of the firſt vaſſal or feudal tenant, to his ſons or ſome one of them, whom the lord ſhould name; (*g*) but in ſuch caſe the feudal donation (*h*) was not extended beyond the words by any preſumed intent, but was

(*f*) Thus in Germany, the old acknowledgment was continued by an expreſs proviſion in the conſtitution, by which feuds were made hereditary, viz. Servato uſu majorum valvaſorum in dandis equis et armis ſuis ſenioribus. Vide feud. lib. 1. tit. 1. et leges Longobard. lib. 3. tit. 8. ſect. 4.

(*g*) Sic progreſſum eſt ut ad filios deveniret, in quem (ſcilt.) dominus hoc vellet beneficium confirmare. Feud. lib. 1. tit 1. Proindeque receptum ut adeos vaſalli filios quibus id beneficii feudi dominos conceſſiſſet deveniret, et poſtmodum temporis tractu inductum eſt ut ad omnes vaſalli filios maſculos inteſtata feudi ſucceſſio æqualiter pertineat. Hanneton de jure feud. 139. Schilt. Cod. de nat. ſucc. feud. cap. 1. §. 5. They were rendered hereditary firſt in the direct line—then in the collateral, and at laſt in the female line. Leg. Longob. l 3. tit. 8. Du Cange voc. Beneficium.

(*h*) Though the feudiſts have generally conſidered feuds as mere donations, yet Mr. Somner (Treat. of Gav. 111.) ſays, that the feudal grant, in reſpect of the incident ſervices, is improperly called a donation, being but feodalis dimiſſio, i. e. a demiſe in fee; but ſtill the feudiſts properly enough called it a donation. Firſt, becauſe it was not originally ſuppoſed to be made for any immediate or contracted equivalent; and the ſervices were rather conſequents of the relation ariſing from the feud or the general feudal policy, (ut ſupra) than immediate returns, in conſideration of the feud or benefit conferred by the lord; and thus Grotius muſt be underſtood, when he ſays (in his treatiſe de jure belli et pacis lib. 2. cap. 12. ſect. 5.) that in feudali contractu rei feudalis conceſſio beneficium eſt, pactio autem militaris operæ pro tutela, eſt, facio ut facias. Secondly, becauſe as the lord had the free choice of his vaſſal, and conferred the feud on whom he pleaſed, and the ſervices of the feud were not ſo much calculated for the particular advantage of the lord, as for the defence of the community united under a feudal policy; the preference given, and intereſt moving from the lord, was a benefit conferred in ſuch a manner, that, in reſpect to the lord, it might very well be called a donation: et licet, ſays Crag. (de jure feud. 42.) feuda aliter hodie comparentur, interveniente ſæpiſſimè pretio, aut alia re pro pretio denominatio tamen ſit ab eo quod prævalet.—Et quanquam pretio interveniente, tamen juſtum pretium nunquam numeraſſe præſumitur, qui ſe fidelitatis et obſequii vinculo alii aſtringit; vinculum enim hoc obſequii pro parte pretii eſt: itaque feudum liberum et gratuitam donationem definimus ad illud quod fieri debet attendentes, non ad id quod in hoc corrupto ſæculo apud degeneres homines in uſu frequenti videmus.

was taken ſtrictly, (*i*) inſomuch, that if the donation was to a man and his ſons, all the ſons ſucceeded *in capita*; and if one of them died, his part did not deſcend to his children, or ſurvive to his brothers, but returned to the lord. (*k*) The reaſon for ſuch a reſtriction in the mode of deſcent, ſhould ſeem to be, that as the perſonal ability of the feudatory to perform the duties of the fief was the motive of the grant, added to the obligation under which his fealty laid him to educate his offspring in a full ſenſe of obedience to his lord, and with fit qualifications for his ſervice in war—that therefore, the fief was not permitted to go, to the collateral relations of the firſt feudatory, whom he could not bind by his acts, and over whoſe education he had no influence—Though, therefore it is evident, that where, in the original grant, there were no particular directions to guide the deſcent, the deſcendants of the firſt acquirer, and none others were admitted, yet if it was not otherwiſe particularly expreſſed, the collaterals ſucceeded; becauſe, as it is conceived, the merit of their blood was part of the conſideration; not ſo properly in the right of heirs, as by way of remainder, under the original charter or grant. Dalrym. on feud. prop. c. 5. ſ. 1.

It is no eaſy matter to fix the preciſe time when each of theſe changes took place. M. l'Ab. Mably conjectures with ſome probability, that Charles Martel firſt introduced the practice of the grants for life—Obſervat. tom. 1. p. 103, 160; and that Louis le Debonnaire was among the firſt who rendered them hereditary, is evident from the authorities to which he refers; id. 429. Mabillon however has publiſhed a placitum of Louis le Debonnaire, A. D. 860.—by which it appears, that he ſtill continued to grant them only during life. De re Diplomatica, l. 6. p. 353. In the year 889, Odo king of France granted lands to Ricabodo *fideli ſuo juri beneficiario et fructario*, during his own life, and if he ſhould die, and a ſon ſhould be born to ſurvive him, that right was to continue during the life of his ſon. Mabillon ut ſupra, p. 556. This was an intermediate ſtep between fiefs merely during life, and fiefs hereditary to perpetuity. While they continued under the firſt form and were held only during pleaſure, he who granted them not only exerciſed the *dominium* or prerogative of ſuperior lord, but retained the property, giving his vaſſal only the *uſufruct*. But under the latter form, when they became hereditary, although the feudal lawyers continued to define a fief agreeably to its original nature, yet the

(*i*) Feudum ex ſua natura eſt ſpecies quædam dominationis, et æquum eſt ut omnes donationes ſint ſtricti juris, ne quis plus donaſſe præſumatur, quam in donatione expreſſerit. Crag. de jure feud. 50.

(*k*) Crag. de jure feud. 21, 22.

property, in effect, was taken out of the hands of the ſuperior lord, and lodged in thoſe of the vaſſal.

In proceſs of time grandchildren ſucceeded to ſons, and brothers to brothers, (*l*) if the *feud* was *antiquum aut paternum*, that is not newly purchaſed, but came to the brother, by deſcent from his father: but if the feud was what the feudiſts called *novum*, that is newly purchaſed or acquired by a brother, a brother was not permitted to ſucceed to it; unleſs it was by virtue of an expreſs proviſion in the conſtitution of the *feud.* (*m*)

At length however not only deſcendents in the direct line ſucceeded *in infinitum*, but collaterals alſo without regard to their degree, provided they were deſcended from, and were of the blood of the firſt feudatory. (*n*)——See a very excellent book on this ſubject intituled "an introduction to the law of tenures" written by ſir Martin Wright. See alſo the firſt volume of the hiſtory of the emperor Charles the fifth, a very elegant and learned work, written by Dr. Robertſon. Theſe books in particular, I take the liberty of recommending to the ſtudent, becauſe each of them in a clear, and the latter in an elegant manner, deduces the origin, and elucidates the principles of the feudal ſyſtem. To theſe the ſtudent may add, Dr. Blackſtone's tract on the Law of Deſcents,—a tract, in every reſpect equal to the learned productions to which I have above alluded.—— Mr. Hume, in his hiſtory of England, has ſlightly, but ingeniouſly, touched the ſubject; but baron Gilbert's treatiſe upon tenures, and Dalrymple's eſſay on feudal property, are authors well deſerving of the moſt ſerious attention. There is alſo an ingenious "diſcourſe concerning the law of inheritances in "fee ſimple"——written by Mr. R. Robinſon:—though it cannot be denied, but this "diſcourſe" places the author in a

(*l*) Poſtremo vero lege a Conrado imperatore promulgata (feud. lib. 5. tit. 1.) ad nepotes ex filiis maſculis hoc ipſum productum fuit. Hanneton de jure feud. 139, 140. Cum vero Conradus Romam proficiſceretur petitum eſt a fidelibus, qui in ejus erant ſervitio, ut lege ab eo promulgata, hoc etiam ad nepotes exfilio producere dignaretur, et ut frater fratri ſine legitimo hærede defuncto in beneficio quod eorum patris fuit, ſuccedat. feud. lib. 1. tit. 1. 19. lib. 5. tit. 1. Spelm. Poſthumous Treatiſe of Feuds. 4 Crag. de jure feud. 21, 22.

(*m*) Feud. lib. 1. tit. 1, 8, 14. 20. lib. 2. tit. 12, 90.—Crag. de jure feud. 22, 163, 242.

(*n*) Tandem factum eſt ut feuda non ſolum ad deſcendentes in perpetuum tranſirent, ſed etiam ut ad collaterales, qui ex primo vaſallo deſcendebant, in infinitum continuarentur. Crag. de jure feud. 22, 50, 242, 243, 244. Feud. lib. 1. tit. 1. Schilt. de nat. ſucceſſion. cap. 1. ſect. 8. Spelm. Poſthum. Treatiſe of feuds, 4, 5. Zaſius in uſus feud. 46.

very

very reſpectable point of view, yet it muſt be confeſſed, that by attending too much to a favourite ſyſtem, he is leſs intelligible, than otherwiſe he would have been.—Sullivan's Lectures on the Feudal Law, and the Conſtitution and Laws of England, is a publication of great merit, and from whence the ſtudent may derive much neceſſary information. To theſe valuable writings, I beg leave to recommend, to the inſpection of the ſtudent, a very ingenious and laborious *chart*, ſome time ſince publiſhed, by Mr. Fearne——He ſtiles it "an Hiſtorical legi-graphical Chart of "Landed Property in England, from the time of the Saxons to "the preſent æra:" the manifeſt intent of it being "to diſtin-"guiſh in a manner immediately obvious to ſight, the ſeveral "tenures, as well as the mode of deſcent, and powers of aliena-"tion of lands in England, with the ſeveral alterations they "have incurred during a courſe of more than 700 years."

As to the preference of the eldeſt ſon, to the feud, ſee Wright's Ten. 175.——And why males were preferred to females, id. 179, and Sulliv. Lect. xiv. And as to the excluſion of the father from any poſſibility of ſucceeding to the ſon's inheritance, as ſuch, ſee Wright's Ten. 180. and Blac. Com. 2 v. 212.

NOTE [D] p. 262.

The reaſons given for excluding lineal aſcent are, firſt, that fathers and mothers are not of the blood of their children; ſecondly, that the excluſion is agreeable to the Jewiſh law, as preſcribed to Moſes by God Himſelf; and thirdly, that it tends to avoid that confuſion and diverſity of opinions in the caſe of deſcents, of which the allowance of lineal aſcenſion by the *civil* law is ſaid to be the occaſion. 3 Co. 40, Ratcliff's caſe. Lord Coke himſelf controverts the firſt of theſe reaſons, by the words of Littleton in c. 1. ſection 3. (*a*) and by the caſe of adminiſtration, in which the father or mother is preferred as *neareſt of blood* to their children, and alſo by the caſe of a remainder to the ſons *neareſt of blood*, under which deſcription the father is entitled to take by purchaſe. But as to the two other reaſons, lord Coke rather appears to adopt them. However, neither of them ſeem ſatisfactory. The inference from God's precept to Moſes is unwarranted, unleſs it can be ſhewn, that it was promulgated as a law for mankind in *general*, inſtead of being, like many other parts of the Moſaical law, a rule for the direction of the Jewiſh nation *only*. Beſides, by the Jewiſh law, the father did ſucceed to the ſon in excluſion of his brothers, unleſs one of

(*a*) Vide Co. Lit. 11. a, b.

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them married the widow of the deceaſed, and raiſed up ſeed to him. See Blackſtone's Law-tracts, v. 1. p. 182, oct. ed. and Seld. de Succeſſ. Ebræor. c. 12. there cited. The argument from the ſuppoſed confuſion and uncertainty, which might ariſe, if lineal aſcent ſhould be permitted, is not leſs liable to objection; becauſe lineal *aſcent* might be governed by the ſame rules as lineal *deſcent*; and what is the difference between the two, that ſhould create more confuſion and uncertainty in the one caſe than in the other? Our modern writers account for our law's diſallowance of lineal aſcent in a very different way; and, according to them, it in a great meaſure originated from the nature of antient feudal grants, which, like eſtates tail, being confined to the firſt feudatory and his deſcendants, neceſſarily excluded his father and mother, and all paramount to them and alſo his collateral relations. How this rule in *practice* became extended ſo as to exclude lineal aſcent *univerſally*, without confining it to the caſes to which the feudal reaſon for the rule is applicable, and yet at the ſame time is ſo conſtrued, as to let in all collateral relations, and even the father himſelf collaterally, and by the medium of others, is not now very eaſy to explain though this has been attempted. See Wright's Tenure, 180. and Blackſtone's Law-tracts, v. 1. p. 183. oct. ed. See alſo a learned note on the ſubject in Littleton *avec Obſervat. par M. Houard.* This edition of Littleton is in 2 vol. quarto, and was publiſhed at Rouen in 1766.—Vide Hargrave's edit. of Co. Lit. note 1. p. 11. This edition of Coke Littleton, at leaſt ſo much of it as hath already been publiſhed, almoſt puts the editor on a level with the original commentator. Bracton, l. 2. c. 29. gives the following quaint reaſon for the excluſion of lineal aſcent—"Deſcendit itaque jus quaſi "ponderoſum quod cadens deorſum recta linea vel tranſverſali, "et nunquam reaſcendit, &c." This reaſon is alſo adopted by ſir Edward Coke, 1 Inſt. 11. a. from hence it ſhould ſeem that in the opinion of our ancient lawyers, the deſcent of lands was regulated according to the laws of gravitation. This reaſon has been long ſince exploded; and others, which have been drawn from the hiſtory of the rule itſelf, from the principles of the feudal ſyſtem, are now admited, as concluſive, on the ſubject. For which ſee Wright's Ten. 180. Sulliv. Lect. xiv. Blac. Com. 2 v. 208 to 212. The Saxons were perpetually loading deſcents with ſervices, and of conſequence were led to direct thoſe deſcents where thoſe ſervices were likely to be maintained with the greateſt vigour and advantage: this is the faireſt reaſon, and looks likely to be the true one, why the father cannot ſucceed (in this kingdom) into the landed eſtate of his ſon; becauſe he cannot be ſuppoſed in a condition to perform the ſervice that is expected from it. Vide Taylor's Elem. Civil Law, 544. "In

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"prohibiting the lineal aſcent, the common law, (ſays ſir Ed-"ward Coke) is aſſiſted with the law of the twelve tables." 1 Inſt. 11 b. See table 5. l. de ſucceſſione ab inteſtato; but neither in this, nor in any other part of the twelve tables, do I ſee (adds Mr. Hargrave, in his comment on ſir Edward Coke) any thing to exclude lineal aſcent; and as I have not met with any book on the Roman law, in which ſuch excluſion is mentioned, I conclude, that lord Coke is miſtaken in his idea of our laws conforming to the law of the twelve tables. The mother was indeed excluded; but it was not becauſe the law of the twelve tables did not permit lineal *aſcent*, but on account of her ſex, that law preferring the *agnati*, or thoſe related through males, and excluding the *cognati*, or thoſe related through females. See 3 Inſt. 3. Princ. and Harg. note 2. on Co. Lit. 11. a.

CHAP.

CHAP. XII.

Touching trial by jury.

HAVING in the former chapter ſomewhat largely treated of the courſe of deſcents, I ſhall now with more brevity conſider that other title of our law which I before propounded—in order to evidence the excellency of the laws of England above thoſe of other nations, —viz. the trial by a jury of twelve men; which, upon all accounts, as it is ſettled here in this kingdom, ſeems to be the beſt trial in the world; I ſhall therefore give a ſhort account of the method and manner of that trial. [A]

Firſt, the writ to return a jury iſſues to the ſheriff of the county: (*a*) And,

Firſt, HE is to be a perſon of worth and value, that ſo he may be RESPONSIBLE for any defaults, either of himſelf, or his officers: and, is ſworn, faithfully and honeſtly to execute his office. This officer is entruſted to elect and return the jury, which he is obliged to do in this manner: Firſt, without the nomination of either party—Secondly, they are to be ſuch perſons as for eſtate and quality are fit to ſerve upon that employment. Thirdly, they are to be of the neighbourhood of the fact to be inquired, or at leaſt of the county or bailiwick. And, fourthly, anciently four, and now two of them at leaſt, are to be of the hundred. [But this is now in great meaſure altered by ſtatute. [B]

Secondly, touching the number and qualifications of the jury.

As to their number, though only twelve are SWORN, yet twenty-four are to be RETURNED, to ſupply the defects or want of appearance of thoſe that are challenged off, or

(*a*) As to the antiquity and office of ſheriff, ſee Co. Lit. 168. Blac. Com. 1 v. 116.—but particularly. id. 338 to 348. And ſee Seld. notes upon Forteſc. de laud. cap. 24.

make

make default. (*b*) Their qualifications are many, and are generally ſet down in the writ that ſummons them, (*c*) viz. they are to be PROBI ET LEGALES HOMINES. Of ſufficient freeholds, according to ſeveral proviſions of acts of parliament. [C] Not convict of any notorious crime that may render them unfit for that employment. They are not to be of the kindred, or alliance, of any of the parties. And, not to be ſuch as are prepoſſeſſed or prejudiced before they hear their evidence.

Thirdly, the time of their return.

Indeed, IN ASSIZES, the jury is to be ready at the bar the firſt day of the return of the writ; but in other caſes, the panel is firſt returned upon the venire facias, or OUGHT TO BE SO, and the proofs, or witneſſes, are to be brought or ſummoned by DISTRINGAS, or HABEAS CORPORA, for their appearance AT THE TRIAL; whereby the parties may have notice of the jurors, and of their ſufficiency and indifferency, that ſo they may make their challenges upon the appearance of the jurors, if there be juſt cauſe. (*d*)

Fourthly, the place of their appearance.

If it be in caſes of ſuch WEIGHT AND CONSEQUENCE, as by the judgment OF THE COURT is fit to be tried AT THE BAR, then their appearance is directed to be THERE; but in ordinary caſes, the place of appearance is in the country at the aſſizes, or niſi prius, in the county where the iſſue to be tried ariſes: (*e*) and certainly this is an excellent conſtitution. The great charge of ſuits is the attendance of the

(*b*) Vide Co. Lit. 155. a. and Forteſc. de laud. cap. 25. Sir Edward Coke ſeems to think that "the law delighteth herſelf in "the number twelve."—For his reaſon, which is ſomewhat quaint, ſee Co. Lit. 155. a.

(*c*) The writ of venire facias. See Seld. on Forteſc. de laud. c. 25. and Blac. Com. 3 v. 352.

(*d*) Challenges are of two ſorts; either to the *array*, which is at once an exception to the whole panel, in which the jury are arrayed, or ſet in order by the ſheriff, in his return; or, to the *polls*, *in capita*, and which are exceptions to particular jurors; theſe ſir Edward Coke (1 Inſt. 156.) reduces to four heads: *propter honoris reſpectum*; *propter defectum*; *propter affectum*; and *propter delictum*. See Gilb. Hiſt. C. P. cap. 8. Seld. Baron. II. 11. Finch. L. 401. But ſee Blac. Com. l. 3. c. 23.

(*e*) See this explained by Mr. Juſtice Blackſtone, in the third volume of his Commentaries, page 352. ſeq.

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parties, the jury-men and witneſſes. And therefore though the preparation of the cauſes in point of pleading to iſſue, and the judgment, is for the moſt part in the courts at Weſtminſter, whereby there is kept a great order and uniformity of proceedings in the whole kingdom, to prevent multiplicity of laws and forms; yet thoſe are but of SMALL charge, or trouble, or attendance; one attorney being able to diſpatch forty men's buſineſs with the ſame eaſe, and no greater attendance than one man would diſpatch his own buſineſs. The great charge and attendance is AT THE TRIAL, which is therefore BROUGHT HOME to the parties in the countries, and for the moſt part near where they live.

Fifthly, the perſons BEFORE WHOM they are to appear.

If the trial be AT THE BAR, it is to be before that court where the trial is; if in the country, then before the juſtices of aſſizes, or niſi prius; who are perſons well acquainted with the common law, and for the moſt part are TWO of thoſe twelve ordinary juſtices who are appointed for the common diſpenſation of juſtice in the three great courts at Weſtminſter. And this certainly was a moſt wiſe conſtitution: for

Firſt, it prevents factions and parties in the carriage of buſineſs, which would ſoon appear in every cauſe of moment, were the trial only before men reſiding in the counties,—as juſtices of the peace, or the like,—or before men of little or no place, countenance or preheminence above others; and the more to prevent partiality in this kind, thoſe judges are by law prohibited to hold their ſeſſions in counties where they were born or dwell. (f)

Secondly, as it prevents factions and part-takings, ſo it keeps both the rule and the adminiſtration of the laws of the kingdom UNIFORM; for thoſe men are employed as juſtices, who as they have had a common education in the ſtudy of the law, ſo they daily in term-time converſe and conſult with one another; acquaint one another with their

(f) The better to remove all ſuſpicion of partiality, it was wiſely provided by the ſtatutes 4 Edw. III. c. 2. 8 Rich. II. c. 2. and 33 Hen. VIII. cap. 24. that no judge of aſſize ſhould hold pleas in any county wherein he was born or inhabits.

judg-

judgments; ſit near one another in Weſtminſter-hall, whereby their judgments and deciſions are neceſſarily communicated to one another, either immediately, or by relation of others; and by this means their judgments and their adminiſtration of common juſtice, carry a CONSONANCY, CONGRUITY AND UNIFORMITY ONE TO ANOTHER;—whereby both the laws and the adminiſtrations thereof, are preſerved from that confuſion and diſparity that would unavoidably enſue, if the adminiſtration was by ſeveral INCOMMUNICATING hands, or by PROVINCIAL eſtabliſhments. And beſides all this, all thoſe judges are ſolemnly ſworn to obſerve and judge ACCORDING TO THE LAWS of the kingdom, and according to the beſt of their knowledge and underſtanding.

Sixthly, when the jurors appear, and are called, each party has liberty to take his challenge to the ARRAY itſelf, if unduly or partially made by the ſheriff;—or if the ſheriff be of kin to either party; or to the POLLS; either for inſufficiency of freehold, or kindred or alliance to the other party, or ſuch other challenges, either principal, or to the favour, as renders the juror unfit and INCOMPETENT to try the cauſe;—and the challenge being confeſſed, or found true, by ſome of THE REST of the jury, that particular incompetent perſon is withdrawn.

Seventhly, then twelve, and NO LESS, of ſuch as are INDIFFERENT and are returned upon the principal panel, or the tales, are ſworn to try the ſame ACCORDING TO THE EVIDENCE.

Eighthly, being thus ſworn, the evidence on either part, is given in upon the OATH of witneſſes; or other evidence by law allowed;—as records and ancient deeds, but later deeds and copies of records muſt be atteſted by the oaths of witneſſes—and other evidence in the open court, and in the preſence of the parties, their attornies, council and all by-ſtanders, and before the judge and jury; where each party has liberty of EXCEPTING, either to the competency of the evidence, or the competency or credit of the witneſſes; which exceptions are PUBLICLY ſtated, and by the judges openly or publicly allowed or diſallowed;—wherein if the judge be PARTIAL, his partiality and injuſtice will be evident to all by-ſtanders; and if in his di-

rection or deciſion he miſtake the law, either through PARTIALITY, IGNORANCE, OR INADVERTENCY, either party may require him to ſeal A BILL OF EXCEPTION, (g) thereby to deduce the error of the judge (if any were) to a due ratification or reverſal by writ of error. [D]

Ninthly, the excellency of this OPEN courſe of evidence to the jury in preſence of the judge, jury, parties and council, and even of the adverſe witneſſes, appears in theſe particulars:——

Firſt, that it is open, and not in private before a commiſſioner or two, and a couple of clerks; where oftentimes witneſſes will deliver that which they will be aſhamed to teſtify publicly.

Secondly, that it is ORE TENUS perſonally, and not in writing; wherein oftentimes, yea too often, a crafty clerk, commiſſioner, or examiner, will make a witneſs ſpeak what he truly never meant, by his dreſſing of it up in his own terms, phraſes, and expreſſions; whereas, on the other hand, many times the very MANNER of delivering teſtimony, will give a probable indication whether the witneſs ſpeaks truly or falſly; and by this means alſo he has an opportunity to correct, amend, or explain his teſtimony upon further queſtioning with him, which he can never have after a depoſition is ſet down in writing. Vide Blac. Com. 3 v. 373.

Thirdly, that by this courſe of perſonal and open examination, there is opportunity for all perſons concerned,

(g) This the judge is obliged to ſeal by ſtat. Weſtm. 2. 13 Edw. I. c. 31.; but, ſhould he refuſe to ſeal it, the party may have a compulſory writ againſt him. Reg. Br. 182. a. 2 Inſt. 487. This writ enjoins him to ſeal the bill of exceptions, if the fact alledged be truly ſtated; for, in the bill, the counſel muſt ſtate the point, wherein the judge is ſuppoſed to have erred. If to this writ the judge returns that the fact is untruly ſtated, when, in truth, the caſe is otherwiſe, then an action may be maintained againſt him, for ſuch his falſe return. This bill of exceptions is in the nature of an appeal; examinable, NOT in the court out of which the record iſſues for trial, but in the next immediate ſuperior court, upon a writ of error, after judgment given in the court below. But this mode has been of late years much diſcontinued, as it is now common for the courts to grant new trials for the miſdirection of the judge at niſi prius.

viz.

viz. The judge, or any of the jury, or parties, or their council or attornies,—to propound occaſional queſtions, which beats and boults out the truth much better, than when the witneſs only delivers a formal ſeries of his knowledge without being interrogated; and on the other ſide, preparatory, limited, and formal interrogatories in writing, preclude this way of occaſional interrogations, and the beſt method of ſearching and ſifting out the truth is choaked and ſuppreſſed.

Fourthly, alſo by this perſonal appearance and teſtimony of witneſſes, there is opportunity of CONFRONTING the adverſe witneſſes; of obſerving the contradiction of witneſſes ſometimes of the ſame ſide; and by this means great opportunities are gained for the true and clear diſcovery of the truth.

Fifthly, and further, the very quality, carriage, age, condition, education, and place of commorance of witneſſes, is by this means plainly and evidently ſet forth to the court and the jury; whereby the judge and jurors may have a full information of them; and the jurors, as they ſee cauſe, may give the more or leſs credit to their teſtimony;—for the jurors are not only judges of THE FACT;—but many times of the truth of evidence: and if there be juſt cauſe to diſbelieve what a witneſs ſwears, they are NOT bound to give their verdict according to the evidence or teſtimony of THAT witneſs; and they may ſometimes give credit to ONE witneſs, though oppoſed by more than one. And indeed, it is one of the excellencies of this trial above the trial by witneſſes, that although the jury ought to give a great regard to witneſſes and their teſtimony, yet THEY ARE NOT ALWAYS BOUND BY IT; but may either upon reaſonable circumſtances, inducing a blemiſh upon their credibility, though otherwiſe in themſelves in ſtrictneſs of law they are to be heard, pronounce a verdict CONTRARY to ſuch teſtimonies, the truth whereof they have JUST cauſe to ſuſpect; and may and DO OFTEN pronounce their verdict upon one ſingle teſtimony, which thing the civil law admits not of.

Tenthly, another excellency of this trial is this; that the judge is always preſent at the time of the evidence given in it. Herein he is able, in matters of law emerging upon

the evidence, to direct them; and also, in matters of fact to give them a great light and assistance by his weighing the evidence before them, and OBSERVING WHERE THE QUESTION AND KNOT OF THE BUSINESS LIES, and by shewing them his opinion even in matter of fact; which is a great advantage and light to lay-men. And thus, as the jury assists the judge in determining the matter of FACT, so the judge assists the jury in determining points of LAW, and also very much in investigating and enlightning the matter of fact, whereof the jury are judges.

Eleventhly, when the evidence is fully given, the jurors WITHDRAW to a private place, and are kept from all speech with either of the parties, till their verdict is delivered up; (*b*) and from receiving any evidence other than in OPEN COURT, where it may be searched into, discuss'd and examined. In this recess of the jury they are to consider their evidence, and if any writings under seal were given in evidence, they are to have them with them; they are to weigh the credibility of witnesses, and the force and efficacy of their testimonies, wherein, as I before said, they are not precisely bound to the rules of the civil law, viz. To have TWO witnesses to prove every fact; (*i*) unless it be in cases of treason;—nor to reject one witness because he is single, or always to believe two witnesses if the probability of the fact does upon other circumstances reasonably encounter them: for the trial is NOT here simply BY WITNESSES, but

(*b*) Stiernhook expresses himself in the following manner, on the confinement of an English jury:—"ad absolvendum verò vel condemnandum, in Angliâ, necessitate compelluntur, atque coufque famelici et quasi captivi includuntur, nemine intromisso, donec absolverint seu condemnaverint." De jure Sueonum et Gothorum vetusto, Holmiæ, 1672, cap. iv. p. 59.

(*i*) By the civil law, in all cases (according to Domat) where proof by witnesses may be received, it is necessary that there should be two of them at least.—One single witness, of what quality soever he may be, makes no proof. Dom. Civ. Law, 1 v. 450. But see Tholoss. Syntagm. Juris, lib. 48. cap. 13. sect. 9. Corvinus Enchirid. tit. de Testibus. Ulpianus, lib 31. ad edict. Digest, lib. 22. tit 5. Fortesc. de laud. cap. 20, 32.—Waterhouse on Fortesc. 250. Plow. Com. 12. In some cases, I believe the civil law, allows of a single witness only; but in full proof of a fact, two at least, are required as sufficient. This the civilians should seem to have received from the Jews. Vide Deut, xix. 15. Matth. xviii. 16.

by jury; nay, it may ſo fall out, that the jury upon their own knowledge, may know a thing to be FALSE, that a witneſs ſwore to be true, or may know a witneſs to be incompetent or incredible, though nothing be objected againſt him, and may give their verdict accordingly.

Twelfthly, when the whole twelve men are AGREED, then, and not till then, is their verdict to be received; and therefore the majority of aſſentors does NOT conclude the minority, as is done in ſome countries where trials by jury are admitted. But if any one of the twelve DISSENT, it is NO verdict, nor ought to be received, It is true, that in ancient times, as Hen. II. and Hen. III's. time, yea, and by Fleta in the beginning of Edw. I's. time, if the jurors diſſented, ſometimes there was added a number equal to the greater party, and they were then to give up their verdict by twelve of the old jurors, and the jurors ſo added; but this method has been long time antiquated, notwithſtanding the practice in Bracton's time, lib. 4 cap. 19. and Fleta, lib. 4. cap. 9:—for at this day the entire number firſt empanelled and ſworn are to give up an UNANIMOUS VERDICT, otherwiſe it is none. [E.] And indeed this gives a great weight, value and credit to ſuch a verdict, wherein twelve men muſt unanimouſly agree in a matter OF FACT, and none diſſent; though it muſt be agreed, that an ignorant parcel of men are ſometimes governed by a few that are more knowing, or of greater intereſt or reputation than the reſt.

Thirteenthly, but if there be matter of law that carries in it any difficulty, the jury may, to deliver themſelves from the danger of an attaint, find it SPECIALLY; that ſo it may be decided in that court where the verdict is returnable; and if the judge over-rule the point of law, contrary to law, whereby the jury are perſwaded to find a general verdict—which yet they are not bound to do, if they doubt it,—then the judge, upon the requeſt of the party deſiring it, is bound by law, in convenient time, to ſeal a bill of exceptions, containing the whole matter excepted to; that ſo the party grieved, by ſuch indiſcretion or error of the judge, may have relief by writ of error on the ſtatute of Weſtminſter 2.

Fourteenthly, although upon general verdicts given at the bar in the courts at Weſtminſter, the judgment is given

WITHIN FOUR DAYS, in preſumption that there cannot be any conſiderable ſurprize in ſo ſolemn a trial, or at leaſt it may be ſoon eſpied; yet upon trials by niſi prius in the country, the judgment is not given preſently by the judge of niſi prius, unleſs in caſes of QUARE IMPEDIT: but the verdict is returned after trial, into that court from whence the cauſe iſſued; that thereby, if any ſurprize happened either through much buſineſs of the court, or through inadvertency of the attorney, or council, or through any miſcarriage of the jury, or through any other caſualty, the party may have his redreſs in that court from whence the record iſſued.

And thus ſtands this excellent order of trial by jury, which is far beyond the trial by witneſſes according to the proceedings of the civil law, and of the courts of equity, both for the certainty, the diſpatch, and the cheapneſs thereof. It has all the helps to inveſtigate the truth that the civil law has, and many more. For, as to certainty,

Firſt, it has the teſtimony of witneſſes, as well as the civil law and equity courts.

Secondly, It has this teſtimony in a much more advantageous way than thoſe courts, for diſcovery of truth.

Thirdly, it has the advantage of the judge's obſervation, attention, and aſſiſtance, in point of law by way of deciſion, and in point of fact by way of direction to the jury.

Fourthly, it has the advantage of the jury, and of their being de vicineto, who oftentimes know the witneſſes and the parties: (*k*) and,

Fifthly, it has the unanimous ſuffrage and opinion of twelve men, which carries in itſelf a much greater weight and preponderation to diſcover the truth of a fact, than any other trial whatſoever.

And as this method is more certain, ſo it is much more expeditious and cheap; for oftentimes the ſeſſion of one commiſſion for the examination of witneſſes for one cauſe

(*k*) The jury now only come *de corpore comitatus*, and not *de vicineto*. See 4 & 5 Ann. c. 16.— 24 Geo. 2. c. 18. and note [B] on this chapter.

in

in the eccleſiaſtical courts, or courts of equity, laſts as long as a whole ſeſſion of niſi prius, where a hundred cauſes are examined and tried.

And thus much concerning trials in civil cauſes. As for trials in cauſes criminal, they have this further advantage, that regularly the accuſation, as preparatory to the trial, is by A GRAND JURY. (*l*) So that as no man's intereſt, according to the courſe of the common law, is to be tried or determined without the oaths of a jury of twelve men; ſo no man's life is to be tried but by the oaths of twelve men, and by the PREPARATORY ACCUSATION or indictment by twelve men, or more, PRECEDENT to his trial; unleſs it be in the caſe of an appeal at the ſuit of the party. (*m*)

(*l*) As to a grand jury, ſee Blac. Com. l. 4. c. 23.

(*m*) Mr. Juſtice Blackſtone conceives that there are ſome few defects in this mode of deciſion, and which he enumerates in the concluſion of the twenty-third chapter of the third book of his Commentaries. But ſhould thoſe defects continue unremedied and unſupplied, "ſtill, continues this learned judge, with all its imperfections, I truſt that this mode of deciſion will be found the beſt criterion, for inveſtigating the truth of facts, that ever was eſtabliſhed in any country."

Jan. 6, 1779.

C. R.

ADDITIONAL NOTES

TO THE

TWELFTH CHAPTER.

NOTE [A] p. 286.

THE method of trial by *jury*, which is alſo denominated trial *per pais*, or *by the country*, is juſtly eſteemed one of the chief excellencies of our conſtitution, it being an inſtitution moſt admirably calculated for the preſervation of liberty, life, and property: indeed, what greater ſecurity can we have for theſe ineſtimable bleſſings, than the certainty that we cannot be diveſted of either, without the unanimous deciſion of twelve of our honeſt and impartial neighbours? Our ſturdy anceſtors inſiſting on it as the principal bulwark of their liberties, compelled the confirmation of it, by magna charta; "nullus liber homo capiatur, "(ſpeaks the charter, chap. 29.) vel impriſonetur, aut diſſeiſie-"tur de libero tenemento ſuo, vel libertatibus, vel liberis conſue-"tudinibus ſuis, aut utlagetur, aut exuletur, aut aliquo modo "deſtruatur, nec ſuper eum ibimus, nec ſuper eum mittemus, "NISI PER LEGALE JUDICIUM PARIUM SUORUM, VEL PER "LEGEM TERRÆ."

The invention of this ſpecies of trial has been attributed to the ſuperior genius of Alfred the great; there ſeems but little reaſon, however, to adopt the idea; the merit of Alfred conſiſting, according to Sullivan, (*a*) rather in fixing the number, and determining the qualities of jurors, than in the inſtitution itſelf. The truth ſeems to be that this tribunal was univerſally eſtabliſhed among all the northern nations, and ſo interwoven in their very conſtitutions, that the earlieſt account of the one gives us alſo ſome traces of the other. In this nation, it ſhould ſeem to have been uſed time out of mind, and to have been coeval with the firſt civil government thereof; and though it's eſtabliſhment was ſhaken for a time by the introduction of the Norman trial by battel, it was always ſo highly valued by the people, that no conqueſt, no change of government, could ever prevail to abo-

(*a*) Lect. xxvi.

liſh

liſh it. See Forteſc. de laud. leg. Ang. cap. 25. Spelm. Gloſſ. verb. Jurata. Glanv. l. 2. c. 7. Co. Lit. 155. Co. in pref. to the 3d and 8th Rep. Blac. Com. 3 v. c. 23. paſſim. Sulliv. Lect. p. 251, 247, 294, 356. Barr. on Stat. 17, 18, 19, 86, 457. Hickes's Theſ. vol. II. p. 34, and ſeq. See alſo an excellent eſſay on "the conſtitution of England," written by J. L. de Lolme, cap. 9, 10, 11. This book is recommended to the public, by the author of the elegant letters under the ſignature of Junius "as a performance, deep, ſolid, and inge-"nious." Pref. 31.

NOTE [B] p. 286.

By the policy of our antient law, the jury was to come *de vicineto*, from the neighbourhood of the place where the action was laid; and therefore, the jury were ſummoned from the very hundred, in which the cauſe of action aroſe; and, in the opinion of Gilbert, the fact itſelf was originally determined in the court of the hundred. Living in the neighbourhood, they were, moſt unqueſtionably, the very county, or *pais*, to which both parties had thought proper to appeal; and thus circumſtanced, were with the greateſt propriety ſuppoſed to have had a prior and a perfect knowledge, as well of the characters of the parties themſelves, as of the witneſſes, which each of them might think proper to adduce in ſupport of that which he was called upon either to validate or defend: and from whence it was concluded, that they the better knew what credit to give to the facts in evidence before them. This convenience, however, was ſoon materially affected, from the difficulty which aroſe in the getting of twelve freeholders in every hundred. To this difficulty, may be added an inconvenience, which in proceſs of time, was found to have reſulted from this antient and long continued mode of ſummoning the jury. It was found by woeful experience, that the jurors, from the very circumſtance alone, of being of the immediate neighbourhood, were too apt to be prejudiced to either the one ſide or the other. Long ſenſible of the difficulty of obtaining a perfect jury from the hundred, and daily perceiving the partiality of their deciſions, our law has for a long time been gradually relinquiſhing the practice. In the reign of Edward the third, the number of neceſſary hundredors were conſtantly ſix—theſe, in the time of Forteſcue (de laud. L. L. c. 25.) were reduced to four. Indeed the ſtatute 35 Hen. VIII. c. 26. reſtored the antient number of ſix, but that was ſoon virtually repealed by ſtatute 27 Eliz. c. 6. which required only two. However the number were reduced, yet, ſome were continued; the law

ſtill

ſtill conceiving it to be neceſſary that ſome at leaſt of the *pares* of the hundred, ſhould determine the fact between the parties.—Sir Edward Coke indeed, 1 Inſt. 157. adduces ſuch a variety of inſtances in which the courts permitted the neceſſary number to be evaded, that it is manifeſt they were heartily tired of it. At length, by ſtatute 4 & 5 Ann. c. 16. it was entirely aboliſhed upon all civil actions, except upon penal ſtatutes; and upon thoſe alſo by the 24 Geo. 2. c. 18. the jury being now only to come *de corpore comitatus*, from the body of the county at large, and not *de vicineto*, or from the particular neighbourhood. See baron Gilbert's Hiſt. and Pract. of the court of common pleas, cap. 6, 7, 8. *paſſim*. This book, I take the liberty of recommending to the ſtudent, as a performance that will moſt amply reward his moſt ſtudious attention.—It muſt be confeſſed however, that this poſthumous work, of ſo excellent an author, has ſuffered much from the ignorance or the inattention of thoſe, who have attempted to edite it. See alſo Mr. Hargrave's note on Co. Lit. 125. a. note 2. and H. H. P. C. 2 v. 272.

NOTE [C] p. 287.

By the ſtatute Weſtminſter 2. 13 Ed. I. c. 38. none ſhall paſs on juries in aſſizes within the county, but ſuch as may diſpend twenty ſhillings by the year at the leaſt; which is encreaſed to forty ſhillings by the ſtatute 21 Ed. I. ſtatute 1 and 2. Henry V. ſtatute 2. c. 3. This was doubled by the ſtatute 27 Eliz. c. 6. which requires in every ſuch caſe the jurors to have eſtate of freehold to the yearly value of four pounds at the leaſt. But, the value of money at that time decreaſing very conſiderably, this qualification was raiſed by the ſtatute 16 and 17 Car. II. c. 3. to twenty pounds *per annum*, which being only a temporary act, for three years, was ſuffered to expire without renewal, to the great debaſement of juries. However by the ſtatute 4 and 5 W. and M. c. 24. it was again raiſed to ten pounds *per annum* in England and ſix pounds in Wales, of freehold lands *or copyhold*; which is the firſt time that copyholders (as ſuch) were admitted to ſerve upon juries in any of the king's courts, though they had before been admitted to ſerve in ſome of the ſheriff's courts, by ſtatutes 1 Rich. III. c. 4. and 9 Henry VII. c. 13. And, laſtly, by ſtatute 3 Geo. II. c. 25. any leaſeholder for the term of five hundred years abſolute, or for any term determinable upon life or lives, of the clear yearly value of twenty pounds *per annum*, over and above the rent reſerved, is qualified to ſerve upon juries. When the jury is *de medietate linguæ*, that is, one moiety of the Engliſh tongue or nation, and the other of any

any foreign one, no want of lands ſhall be cauſe of challenge to the alien; for, as he is incapable to hold any, this would totally defeat the privilege.

NOTE [D] p. 290.

If the ſtudent is deſirous of obtaining a thorough knowledge of the theory of evidence, he may, after peruſing the twenty-third chapter of the third book of Mr. juſtice Blackſtone's commentaries, conſult *Duncombe's Trials per pais*, in the chapter on evidence,—the law *of evidence*, by lord chief baron Gilbert; the title *evidence*, in the ſeveral treatiſes on the pleas of the crown, and in the ſeveral abridgements of law and equity; and the head of evidence, in the *law of Niſi prius*. The writings of the Civilians on evidence are very numerous; and the curious reader may ſee an account of them in Buderus's edition of the *Bibliotheca juris ſelecta* by Struvius. Amongſt the moſt admired of their profeſſed writers on the ſubject are Menochius de Præſumptionibus, Maſcardus de probationibus, Everhardus de teſtibus et fide inſtrumentorum, and Farinacius de teſtibus. Struvius's bibliotheca juris will be found very uſeful to the diligent ſtudent, by introducing him to a knowledge of the principal books on the law of nature and nations, the civil and canon law, and the laws of moſt of the countries in Europe, and of the characters of the ſeveral writers. It is to be wiſhed, that we had a Bibliotheca juris Anglicani, written on the ſame critical and enlarged plan. Such a work has been attempted by Mr. Gatzert, a German writer, who has lately publiſhed at Gottingen a book entitled, *Commentatio juris exotici hiſtorico litteraria de jure communi Angliæ.* But though Mr. Gatzert, when the diſadvantage of his being a foreigner is conſidered, has really done wonders; yet it is not to be conceived, that ſuch a work can ever be executed with the requiſite judgment, accuracy, and nicety, until the taſk is undertaken by one of our own country, who hath been regularly trained in the ſtudy of the Engliſh law, and is familiarly acquainted with all the writers on our laws, conſtitution and hiſtory. Vide Harg. note 1. on Co. Lit. 7. a.

NOTE [E] p. 293.

The unanimity of the twelve jurors in their verdict muſt be admitted to be a very ſingular inſtitution. It ſhould ſeem that the reaſon for requiring this, at leaſt in criminal proſecutions, aroſe from compaſſion to the priſoner; againſt whom, if the of-

fence

fence was not proved beyond all poſſibility of doubt in the moſt ſcrupulous juror, it was thought an error on the ſide of mercy, that a ſingle *veto* ſhould acquit him. Another reaſon for this unanimity might poſſibly have ariſen from attaints being frequently brought in ancient times againſt juries, to which puniſhment every juror was liable; it was therefore reaſonable that every one ſhould have a power of diſſenting, and not be concluded by the opinion of others. There is a paſſage in Clarke's preface to the laws of Howel Dha, which, at the ſame time that it ſhews that this mode of trial was in uſe amongſt the Welſh, accounts in ſome meaſure for the unanimity of the petit jury, which is not required from the grand jury. There are perhaps many Engliſhmen, and even lawyers, who do not know, that in Scotland the unanimity of a jury is not required, except in revenue cauſes before the court of exchequer; and that the chancellor or foreman gives the verdict upon a majority of a ſingle juror: they therefore conſiſt of an odd number, viz. fifteen, and are choſen out of five and forty returned by the ſheriff; the pannel or criminal having a right to challenge, as by the Engliſh law. We find that the jury's conſiſting of an odd number is a very antient regulation in Scotland. "Such as be accuſed of "any crime that deſerves death, let them paſs by the ſentence of "ſeven honeſt men, or elſe nine, eleven, or fifteen. (*a*) Fabian, in his chronicle, gives a very particular account of the mayor and aldermen of London (*b*) claiming privileges in the reign of Henry the third, viz. that for a treſpaſs againſt the king, a citizen ſhould be tried by twelve of his citizens; for murder by thirty citizens; and for treſpaſs againſt a ſtranger, by the oath of ſix citizens, and himſelf. Is it poſſible to contend after this, that the trial by TWELVE jurymen was thoroughly introduced, or are there any paſſages, in the old hiſtorians, which clearly prove it to have been ſo eſtabliſhed, before the time of Henry the third? vide Barr. on ſtat. 21.

(*a*) Law of Kenneth, mentioned by Boëthius (Hollingſhead's tranſlation).

(*b*) Theſe privileges claimed by the citizens of London are alluded to in a grant of king John's to the city of Lincoln, in the firſt year of his reign: "Conceſſimus etiam "quod de placitis coronam tan- "gentibus, ſe poſſint *dirationare* "(i. e. clear themſelves), ſecun- "dum conſuetudinem civium ci- "vitatis Londoniæ." Rot. chap. 1mo. Johannis regis, N. 35. Petyt. MS. vol. 1. p. 10.

THE END.

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ERRATA.

P. 69. l. 1. insert the letter *n*. as a reference to the note at the bottom.

P. 110. l. 22. for *asset*, read *esset*.

P. 158. l. 2. insert the letter F. as a reference to the large note under that character.

P. 236. l. 7. for *every*, read *very*.

AN

AN ANALYSIS OF THE CIVIL PART OF THE LAW

BY

SIR MATTHEW HALE.

THE FOURTH EDITION.

Of all the ſchemes hitherto made public for digeſting the laws of England, the moſt natural and ſcientifical of any, as well as the moſt comprehenſive, appeared to be that of ſir Matthew Hale, in his poſthumous Analyſis of the law.

Mr. Juſtice Blackſtone's pref. to his Analy.


G R
III

THE

AUTHOR's PREFACE.

IN the enſuing TRACTATE, I ſhall make an eſſay of reduction of the ſeveral titles of the law into diſtributions and heads according to an analytical method; but the particulars thereof are ſo many, and the connexions of things ſo various therein, that as I ſhall beforehand confeſs that I cannot reduce it to an exact logical method, ſo I muſt declare that I do deſpair at the firſt, yea, the ſecond or third eſſay, to reduce all the conſiderable titles thereof under this method. But many things will be omitted, and poſſibly therefore, as they ſhall occur to my memory, will perchance be diſorderly ſhuffled in under ſuch of the diſtributions as may not be ſo proper for them,—or at leaſt inſerted brokenly, without their juſt dependance,—

till upon a ſecond or third, or, perhaps, further eſſay, the ſcheme or abſtract may be entirely new framed.

However, the following eſſay will do thus much good, viz.

Firſt, it will diſcover that it is not altogether impoſſible, by much attention and labour, to reduce the laws of England at leaſt into a tolerable method or diſtribution.

Secondly, it will give opportunity both to myſelf and others, as there ſhall occur new thoughts or opportunities, to rectify and to reform what is amiſs in this, and to ſupply what is wanting; whereby, in time, a more methodical ſyſtem or reduction of the titles of the law, under method, may be diſcovered.

Thirdly, that although, for the moſt part, the moſt methodical diſtributors of any ſcience rarely appear ſubtile or acute in the ſciences themſelves,—becauſe, while they principally ſtudy the former, they are leſs ſtudious and advertent of the latter;—yet a method, even in the common law, may be a good means to help the memory to find out MEDIA of probation, and to aſſiſt in the method of ſtudy.

And although the laws of England are generally diſtributed into the common law, and ſtatute law, I ſhall not diſtribute my analyſis according to that method, but ſhall take in and include them both together, as conſtituting one common bulk or matter of the laws of England. Nor ſhall I confine myſelf to the method, or terms, of the civil law, nor of others who have given general ſchemes and analyſes of laws; but ſhall uſe that method, and thoſe words or expreſſions, that I ſhall think moſt conducible to the thing I aim at.

The laws of this kindom do reſpect either,

Civil rights; or,
Crimes and miſdemeanors.

This I ſhall ſubſtitute as the general matter of the laws of England; not troubling myſelf with criticiſms or propriety of words, in which reſpect the very word CIVIL includes alſo matters criminal; becauſe civil conſtitutions give the denomination of crimes, and the rules and method of their puniſhment: but it ſhall be ſufficient that I uſe ſuch expreſſions as either are in themſelves proper to expreſs the thing I mean, or that, by my uſage and application of them, I render ſerviceable to that purpoſe and end.

I ſhall therefore divide the laws of this kingdom, in relation to their matter, into two kinds.

1. The

1. The civil part, which concerns civil rights, and their remedies.

2. The criminal part, which concerns crimes and misdemeanors.

And these, to avoid confusion, I shall dispose into several sections.

And first, I begin with the law as it relates to civil matters.

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THE

THE

LIFE

OF

SIR MATTHEW HALE, Knt.

——— *quid virtus, et quid ſapientia poſſit,*
Utile propoſuit nobis exemplar ———

HOR. Epiſt.

DR. JOHNSON remarks *(a)*, that no ſpecies of writing ſeems more worthy of cultivation than Biography, ſince none can be more delightful, or more uſeful; none can more certainly enchain the heart by irreſiſtible intereſt, or more widely diffuſe inſtruction to every diverſity of condition;---that there are many inviſible circumſtances, which, whether we read as inquiries after natural or moral knowledge; whether we intend to enlarge our ſcience, or increaſe our virtue; are more important than public occurrences. Thus Salluſt, the great maſter of nature, has not forgot, in his account of Cataline, to remark, that "his walk was now quick, and again ſlow," as an indication of a mind revolving ſomething with violent commotion. Thus, the ſtory of Melancthon, affords a ſtriking lecture of the value of time, by informing us, that when he made an appointment, he expected

(a Rambler.)

not only the hour, but the minute to be fixed, that the day might not run out in the idleneſs of ſuſpence; and all the plans and enterprizes of De Wit are now of leſs importance to the world, than that part of his perſonal character which repreſents him as "careful "of his health, and negligent of his life."

Tho' the confined ſcope of this deſign will not permit a copious enumeration of occurrences in the life of Sir Matthew Hale, yet I truſt that ſufficient is retained to mark his private conduct, and evince his public character. In a biographical tract of ſuch little moment as this which I have obtruded on the public, the minute detail of family derivation would be rather impertinent than proper; I have therefore avoided the tedious narration of Sir Matthew's progenitors, with this remembrance, that they were virtuous and reſpectable. Alderley in Glouceſterſhire had the honor of his birth, on the 1ſt of November, 1609. From hence to the period at which he wrote himſelf man, not any thing tranſpired of ſufficient conſequence to need either obſervation or recital: ſuffice it then to mention, that in the ſeventeenth year of his age he was entered of Magdalen-hall, in the univerſity of Oxford; and that on the 8th of November, 1629, he was admitted of Lincoln's-inn. Here, if the authority of Burnet, may be relied on, he ſtudied for many years at the rate of ſixteen hours a day *(b)*. The juriſprudence of his own country, though

(*b*) The human mind is not capable of ſuch exertion, for any great length of time: A milder mode ſeems to meet with the approbation of the laborious Sir Edward Coke——

"Sex horas ſomno, totidem des legibus æquis;
"Quatuor orabis, des epuliſque duas;—
"Quod ſupereſt ultro ſacris largire Camænis."

Co. Lit. 64. b.

the

the primary, was by no means the ſole object of his attention; for he applied himſelf with great avidity to the contemplation of the roman law; and tho' he preferred the mode of deciſion by juries, to that of the civil law, where much is intruſted to the judge; yet he often affirmed, that the principles of juriſprudence were ſo well delivered in the Digeſts, that law could not be underſtood as a ſcience, without firſt reſorting to them for information. This affirmation, however reſpectable, may in ſome degree be diſputable; it is not ſurely ſo ſelf-evident, but it may, with deference, be doubted: for tho' the knowledge of the civil law has deſervedly been conſidered as no ſmall acquiſition to the Engliſh ſtudent; yet is it, in reality, eſſential to the underſtanding of our own municipal ſyſtem, which having been built upon the ſoundeſt foundations, and ſanctified by the teſtimony of experience, cannot require aſſiſtance from any foreign code, however admirable, or however juſt? The learned and elegant Commentator is of opinion, that "we muſt not carry our veneration ſo far, as to ſacrifice our Alfred and Edward to the manes of Theodoſius and Juſtinian: that we muſt not prefer the edict of the prætor, or the reſcript of the roman emperor, to our own immemorial cuſtoms, or the ſanctions of an Engliſh parliament, unleſs we can alſo prefer the deſpotic monarchy of Rome and Byzantium, for whoſe meridian the former were calculated, to the free conſtitution of Britain, which the latter are adapted to perpetuate *(c)*."

Great improvement is, of courſe, the reſult of intenſe application. In the revolution of a few years,

(c) Blac. Com. Oct. Vol. I. 5.

Hale had obtained not only an high profeſſional reputation, but was allowedly well verſed in ſcholaſtic knowledge: algebra and mathematics were with juſtice ranked among his acquiſitions; and that he was perfectly converſant with the curious experiments and diſcoveries of the times in which he lived, is apparent from the treatiſe, which he wrote on the rarefaction and condenſation of air; a treatiſe which ſhews as great accuracy, and as much ſubtilty, as the principles to which he adhered would admit. Ancient hiſtory, chronology, and philoſophy, were amuſements for his hours of relaxation; and, through his intimacy with Mr. Selden, he underſtood the moſt curious points of rabbinical learning.

Where different ſciences are purſued at the ſame time, if one be abſtracted and unpleaſant, the other ſhould be leſs abſtruſe and more entertaining; for when pleaſure ſucceeds the labor of application, the fatigue of meditation is borne with undiſturbed tranquility:—thus, while a dull and heavy hour is relieved by ſome alluring employment of the mind, diverſion enriches the underſtanding, and pleaſure is turned to advantage. Such ſhould ſeem to have been the opinion of Hale; for when wearied with ſtudying either law or divinity, he would (to uſe his own words) "recreate himſelf with philoſophy or mathe-"matics;" alledging, that no man could be maſter of any profeſſion, without having ſome ſkill in all the ſciences. The mathematics, indeed, reward attention with demonſtration, and when purſued with inflexible application, ſtrengthen and enlarge the powers, while they confine the luxuriance of the human mind; but though they render us more ſcientific, yet they neither increaſe our virtue, nor facilitate our

happineſs. Similar probably were the ſentiments of Hale, who, though a proficient in the ſcience, uſed it only as ſubſervient to his more ſerious avocations.

He ſeemed particularly attached to the ſtudy of divinity; and thoſe who read his religious diſquiſitions, may be induced to think, that the ſcience of theology engaged the principal part of his attention:—here, therefore, it may not be improper to remark, that the gnavus mane forum, and ſub galli cantum, of Horace, were precepts ſo high in the eſtimation of Hale, that he rigidly obſerved them. In truth ſo averſe was he from the diſſipation of time, that he would not even correſpond with his friends, except on neceſſary buſineſs, or matters of learning: in ſhort, he made every human aid contribute in advancing him to a ſuperior degree of knowledge and of wiſdom.

Soon after his appearance at the bar, the civil war commenced; and when the earl of Strafford and archbiſhop Laud (who had eſpouſed the cauſe of Charles I.) were tried, he was aſſigned their counſel *(d)*: he had afterwards the honor of being aſſigned to officiate, in his profeſſional character, for the king himſelf; but was not, in that inſtance, permitted to plead, becauſe Charles had refuſed ſubmiſſion to the

(*d*) Burnet affirms, that he was retained for Strafford and Laud, yet it does not by the trial appear, that Hale was retained for the earl. His counſel were Mr. Lane, Mr. Gardiner, Mr. Loe and Mr. Lightfoot. Vide Stat. Tr. Vol. I. p. 759; But Hale attended as counſel for his grace, and in the conduct of that important cauſe was aſſiſted by Mr. Hern and Mr. Gerard. The former, indeed, took the lead, and in defence of his client "delivered "his argument very freely and "ſtoutly, proving, that nothing "which his client had either ſaid "or done, according to the "charge, was treaſon, by any "known eſtabliſhed law of the "kingdom"—This argument (as lord chancellor Finch afterwards informed the archbiſhop) was not Mr. Hern's, but Mr. Hale's. Vide Ib. 938, where the argument is reported at large.

juriſdiction which had aſſumed the power of trying him.

Though digreſſion is inconſiſtent with the regularity of narration, yet I flatter myſelf that the reader will excuſe a trifling deviation. The brief recital of the trial of a ſovereign, in whoſe defence it may rationally be ſuppoſed that Hale was from principle intereſted, added to a conjecture, not altogether improbable, that he furniſhed the objections which Charles ſo pointedly applied---will neither, I truſt, intrude on the attention, nor weary the patience of the reader.

" The dignity of this tranſaction" (ſays the philoſophic hiſtorian) " correſponded to the greateſt " conception that is ſuggeſted in the annals of human- " kind; the delegates of a great people ſitting in " judgment upon their ſupreme magiſtrate, and " trying him for his miſgovernment. The ſolicitor, " in the name of the commons, repreſented, that " Charles Stuart, being admitted king of England, " and entruſted with a limited power; yet, out of a " wicked deſign to erect an unlimited government, " had traitorouſly levied war againſt the parliament, " and the people, whom they repreſented, and was " therefore impeached as a public and implacable " enemy to the common-wealth. After the charge " was finiſhed, the preſident (ſerjeant Bradſhaw) di- " rected his diſcourſe to the king, and told him that " the court expected his anſwer.

" The king though long detained a priſoner, and " now produced as a criminal, ſuſtained the ma- " jeſty of a monarch. With great dignity he declin- " ed the authority of the court, and refuſed to ſub- " mit himſelf to its juriſdiction. He repreſented, " that, having been engaged in treaty with his par-

" liament,

" liament, and having finiſhed almoſt every article,
" he had expected to be brought to his capital in ano-
" ther manner, and to have been reſtored to his power,
" as well as to his liberty: that he could not per-
" ceive any appearance of the upper houſe, ſo eſſen-
" tial a member of the conſtitution; and had learned
" that even the commons, whoſe authority was pre-
" tended, were ſubdued by lawleſs force, and were
" bereaved of their liberty: that he himſelf was their
" native, hereditary king; nor was the whole au-
" thority of the ſtate, tho' free and united, intitled to
" try him, who derived his dignity from the Supreme
" Majeſty of heaven: that, admitting thoſe extra-
" vagant principles which levelled all orders of men,
" the court could plead no power, delegated by the
" people, unleſs the conſent of every individual,
" down to the meaneſt and moſt ignorant peaſant, had
" been firſt obtained: that he acknowledged with-
" out ſcruple, that he had a truſt committed to him,
" a truſt moſt ſacred and inviolable; he was entruſt-
" ed with the liberties of his people, and would not
" betray them, by recognizing a power founded on
" the moſt atrocious uſurpation: that having taken
" arms, and frequently expoſed his life, in defence
" of the conſtitution, he was willing, in this laſt and
" moſt ſolemn ſcene, to ſeal with his blood thoſe
" precious rights, for which, tho' in vain, he had ſo
" long contended: that thoſe who arrogated a title
" to ſit as his judges, were born his ſubjects, and
" born ſubjects to thoſe laws which determined, that
" the king can do no wrong: that he was not re-
" duced to the neceſſity of ſheltering himſelf under
" that general maxim, which guards every Engliſh
" Monarch, even the leaſt deſerving; but was able,

" by the moſt ſatisfactory reaſons, to juſtify thoſe " meaſures in which he had been engaged: that, " to the whole world, and even to them his pre- " tended judges, he was deſirous, if called upon in " another manner, to prove the integrity of his con- " duct, and aſſert the juſtice of thoſe defenſive arms, " to which, unwillingly and unfortunately, he had " had recourſe: but that, in order to preſerve an uni- " formity of conduct, he muſt, at preſent, forego the " apology of his innocence; leſt, by ratifying an au- " thority no better founded than that of robbers and " pirates, he be juſtly branded as the betrayer, in- " ſtead of being applauded as the martyr of the conſti- " tution (e)."

Hale was alſo counſel for the duke of Hamilton (f), the lords Holland, Capel and Craven: but when he ſtepped forth the advocate of the latter, he pleaded with ſuch perſuaſive eloquence, that the very enemies of his client were charmed into admiration, and all who heard him were convinced. The attorney general, indeed, ſo far neglected the propriety of demeanour, as to threaten him for appearing againſt government:---regardleſs, however, of conſequences,

(e) Hume. Vide alſo the Stat. Tr. Vol. I. from folio 986 to 1044. Sir John Dalrymple ſlightly notices the conduct of the commons againſt Charles:—" The republican and puritanical commons (ſays Sir John) with a democratical ſpirit brought their ſovereign, under the forms of juſtice, like a common member of the community, to a public trial, and a public execution. With the ſame levelling hand, they laid the peerage, the church, the parliament, and the law itſelf in the duſt." Mem. Gr. Br. Vol. I. 18.

(f) Mr. Chute, Mr. Hale, Mr. Parſons, and Doctor Walker, were aſſigned counſel for his Grace. Vide Stat. Tr. Vol. II. 2. See alſo Dr. Burnet's Memoirs of the Duke of Hamilton, p. 385, &c. and Clarend. Hiſt. Vol. III. p. 204—209.

Mr.

Mr. Hale, with that becoming warmth which is generally attendant on honeſt confidence, anſwered,--- "I am pleading in defence of laws, which you are "bound to maintain; I am doing juſtice to my "client, and am not by any means to be intimi- "dated."

As his legal qualifications had now rendered him eminently conſpicuous, ſo the rectitude of his conduct had gained him univerſal eſteem. Cromwell, ſeeing the extent of his practice, knowing the tranſcendency of his abilities, and pleaſed perhaps with the boldneſs of his integrity, determined to advance him to the bench. Incapable of hypocriſy, and unmoved by the honor intended him, Hale much doubted the legality of the commiſſion; but reflecting, that juſtice ought, at all events, to be ſupported; he was on matureſt conſideration convinced, that it could not be criminal to become the unbiaſſed inſtrument of its impartial adminiſtration: and this reflection, confirmed by the ſolicitations of his friends, induced him to yield to the propoſal of Cromwell. Indeed, the importunity of the republican party was equally urgent: by the promotion of one who entertained different ſentiments from themſelves, they affected to deſpiſe the idea of private advantage; and to gain the breath of popular applauſe, it was carefully inſinuated, that their importunity aroſe only from the moſt fervent zeal for the public good. "We will truſt (ſaid they) men of "eminent virtue, of what perſuaſion ſoever reſpecting "political matters." But the greateſt ſcruples which Hale entertained, reſpected the propriety of proceeding againſt criminals; he conceiving it to be highly improper, if not wholly unjuſtifiable, to paſs ſentence under

under an authority which was derived from uſurpation: however, in 1653 he accepted the commiſſion which conſtituted him one of the judges of the court of common pleas. In the rota of criminal deciſion he ſat ſome few times on the crown ſide; but on further conſideration refuſed to ſit there any more, becauſe, "in matters of blood, he was always to chuſe the "ſafer ſide."

Within a little time after his preferment, in a cauſe depending before him, the jury were returned, by the expreſs order of Cromwell. Aſtoniſhed at the audacity, and incenſed at the illegality of the act, Hale, with a ſpirit becoming his character, diſmiſſed the jury, and would not try the cauſe. Hurt by the diſappointment, and offended with the conduct, however proper, of the judge, the protector ſaid to him in anger, "you are not fit to be a judge." Hale modeſtly anſwered,---"it is true."

Notwithſtanding this, he continued to adminiſter juſtice until the death of Cromwell, when he not only refuſed the mourning ſent for him and his domeſtics, but alſo to accept the new commiſſion offered him by Richard; and tho' all the judges preſſed it, and employed others to ſolicit him, yet he rejected every importunity, ſaying, "I can act no longer under ſuch "authority."

From this time, until the parliament aſſemb'ed *(g)* which called home Charles II. he ſedulouſly ſecluded himſelf from his profeſſion and the world; but being now returned a member for the county of Glouceſter, his privacy was in conſequence diſturbed;---contem-

(g) May, 1660.

plation

plation now changed into action, and the ſweets of retirement gave way to the calls of his country.

Charles II. immediately after his reſtoration, came to the houſe of peers, and in the moſt earneſt terms preſſed an act of general indemnity; he urged not only the neceſſity of it, but the obligation of a promiſe which he had formerly given; a promiſe, which he would ever regard as ſacred, ſince to that he probably owed the ſatisfaction of meeting his people in parliament.---This meaſure of the king, though irregular, (by his taking notice of a bill which depended before the houſes) was received with great ſatisfaction; and the commons, after ſome debate, appointed a committee to forward the generous purpoſe.

Our author, then ſerjeant Hale, had the honor of being nominated one of the committee *(b)*: and now, in the execution of this high truſt, he exerted all the powers of his mind, and all the goodneſs of his heart, to terminate thoſe confuſions which ſeemed to threaten ruin to the ſtate. His prudence and humanity led him to think, that the ſooner the bill paſſed, the ſooner the bleſſings of peace would be diffuſed;---with an aſſiduity to be equalled only by his philanthropy, he framed, carried on, and ſupported the bill *(i)*.

Soon after this *, he was created lord chief baron; and when the earl of *Clarendon* delivered him the

(*b*) Vide Parl. Hiſt. Vol. II. p. 290.

(*i*) Sir John Dalrymple obſerves that "Charles privately promoted the ſucceſs of the bill of indemnity in the houſe of commons, and publicly checked the ſeverity of the houſe of lords, in their proceedings upon it." Mem. Gr. Br. 21. and Macph. Hiſt. Vol. II p. 35.

(*) November 7, 1660.

com-

commiſſion, he was pleaſed to expreſs himſelf in a very peculiar manner:---"If the king (ſaid that elegant and virtuous chancellor) could "have "found an honeſter or an abler man for the em- "ployment, he would not have advanced you to "it; he prefers you, becauſe he knows no one who "ſo well deſerves it."

Unambitious, diffident and reſerved, Hale was particularly ſtudious to avoid the honour of knighthood, uſually conſequent on ſuch a promotion; and therefore declined every occaſion of waiting on the king; but the chancellor one day introducing him as "the modeſt chief baron," his majeſty, happy in the opportunity, immediately knighted him.

He preſided eleven years in the court of exchequer, where he conducted himſelf with ſuch ſingular propriety, that he not only raiſed the reputation of the court, but by the impartiality of his deciſions, by his diligence, and preciſion, had excited univerſal admiration.

Murmurs were indeed heard, invidiouſly and induſtriouſly inſinuating, that he did not decide with ſufficient quickneſs. Admitting that ſome circumſtances might apparently have juſtified the imputation, yet on the moſt ſcrupulous examination it is evident, that it could not have been the reſult either of ignorance or neglect:—ſolicitude alone induced him to deliberate in deciſion; which had this great, this good effect, that whatever he had once determined, was ſeldom, if ever, heard again.

Burnet remarks, that "nothing was more admir- "able in him, than his patience: that he would "bear

"bear with the meaneſt, and give every man his full "ſcope, thinking it much better to loſe time than pa- "tience. In ſumming up of an evidence to a jury, "he would always require the bar to interrupt him, if "he did miſtake, and to put him in mind of it, if he "did forget the leaſt circumſtance: ſome judges "(adds the biſhop) have been diſturbed at this as a "rudeneſs, which he always looked upon as a ſervice "and reſpect done to him." Juſtice, it has been ſaid, ſhould ſpeedily be adminiſtered. Though the poſition cannot be queſtioned, yet, is there a wiſe, or a good man, who would not prefer the deciſion of one judge, whoſe opinion, tho ſlow, is the effect of deliberation, to that of a thouſand, who determine haſtily, and of courſe hazardouſly? The author of Eunomus (who to the elegance of the ſcholar adds the eaſe of the gentleman) remarks, that thoſe who think diſpatch the great excellence of juſtice, will doubtleſs admire the quickneſs of a *Turkiſh* ſuit; and be inclined to prefer the determination of a Cadi, ſuch an one as Shaw and Norden have deſcribed, to the adminiſtration of juſtice in their own country. The ſpeedineſs, as well as ſeverity of juſtice, in Turkey, is ſaid to be openly avowed, on this principle, that it is better two innocent men ſhould die, than one guilty live. As we glory in adopting the very reverſe of this principle, a greater caution in conformity to the principle will neceſſarily produce a greater length in the enquiry *(k)*.

Hale's adminiſtration of juſtice was not confined to the court in which he preſided; for he was one of the

(*k*) Eunomus, Vol. III. p. 203. and ſee Sir William Temple's eſſay on heroic virtue, fol. edit. p. 225.

principal

principal judges who ſat in Clifford's-inn, to adjuſt the diſputes between the landlords and their tenants, after the dreadful conflagration; and was the firſt who offered to accommodate the differences, reſpecting the rebuilding of the city: and in truth, the peaceable adjuſtment of that great undertaking, was, in no ſmall degree, owing to his care and judgment. Without detracting from the merit of the other judges, it muſt be acknowledged, that he was moſt inſtrumental, in the completion of that beneficent deſign; for he not only aſſiſted at all the determinations, but contrived the rules by which they were accompliſhed (*l*).

The following precepts (from the original under his own hand) he rigidly obſerved; as,

(*l*) On the 18th September, 1666, the parliament met, and immediately paſſed an act, for erecting a court of judicature, and for ſettling all differences between landlords and tenants, with reſpect to houſes which had been deſtroyed by the fire. At the ſame time, they appointed the juſtices of the king's bench and common pleas, and the barons of the exchequer, to be judges of that court. Theſe judges conducted themſelves with ſuch ſtrict juſtice, that they gained the general eſteem of the citizens, who, as a teſtimony of reſpect, cauſed their portraits to be hung up in Guild-hall.—This portrait of Sir Matthew Hale was painted by one Michael Wright,

Mr. Granger enumerates the following portraits of Sir Matthew Hale; viz. Sir Matthew Hale, Lord Chief Juſtice of the King's Bench: M. Wright, p. G. Vertue ſc. 1735; h. ſh.

Mattheus Hale, miles, &c. R, White ſc. a roll in his right hand; large h. ſh.—A copy by Van Hove.

Sir Matthew Hale; large h. ſh. —copied from White

Mattheus Hale, miles, &c. Van Hove ſc. ſitting in an elbow chair; h. ſh.

Matthæus Hale, &c. Van. Howe ſc. ſitting; 8vo.

Matthæus Hale, &c. Clarke, ſc. ſitting; 8vo.

Lord Chief Juſtice Hale; ſmall 4to. printed with the "Sum of "Religion," in a large half ſheet. Vide Grang. Biogr. Hiſt. Vol. III. 8vo. 365.

"THINGS

"THINGS NECESSARY TO BE CONTINUALLY HAD IN "REMEMBRANCE."

"That, in the adminiſtration of juſtice, (uſing his "own words) I am entruſted for God, the king and "country; therefore, that it muſt be done uprightly, "deliberately, reſolutely.

"That I reſt not on my own underſtanding or "ſtrength, but implore and reſt upon the direction "and ſtrength of God.

"That, in the execution of judgment, I carefully "lay aſide my own paſſions, and not give way to "them, however provoked.

"That I be wholly intent upon the buſineſs I am "about, remitting all other cares and thoughts as "unſeaſonable, and interruptions.

"That I ſuffer not myſelf to be prepoſſeſſed with "any judgment at all, 'till the whole buſineſs and "both parties be heard.

"That I never engage myſelf in the beginning of "any cauſe, but reſerve myſelf unprejudiced 'till the "whole be heard.

"That in buſineſs capital, though my nature "prompt me to pity; yet, to conſider that there is "alſo a pity due to the country.

"That I be not too rigid in matters purely con-"ſcientious, where all the harm is diverſity of judg-"ment.

"That I be not biaſſed with compaſſion to the "poor, or favour to the rich, in point of juſtice.

"That popular or court applauſe, or diſtaſte, have "no influence in any thing I do, in point of diſtribu-"tion of juſtice.

"Not

" Not to be ſolicitous what men will ſay or think, " ſo long as I keep myſelf exactly according to the " rule of juſtice.

" If in criminals it be a meaſuring caſt, to incline " to mercy and acquittal.

" In criminals that conſiſt merely in words, when " no more harm enſues, moderation is no injuſtice.

" In criminals of blood, if the fact be evident, ſe- " verity is juſtice.

" To abhor all private ſolicitations, of what kind " ſoever, and by whomſoever, in matters depending.

" To charge my ſervants not to interpoſe in any " buſineſs whatſoever; not to take more than their " known fees; not to give any undue precedence to " cauſes; not to recommend counſel.

" To be ſhort, and ſparing, at meals, that I may " be the fitter for buſineſs."

His attention to the moſt eſſential of theſe rules is ſtrongly evinced by the following inſtances.

A noble duke, having a ſuit depending, came to Sir Matthew, intending to explain the circumſtances which had given riſe to it, that he might the better underſtand it, when before him in court: the chief baron ſuddenly interrupting his grace, ſaid, " you " do not deal fairly to come about ſuch affairs, for I " never receive any information of cauſes but in open " court, where both parties are to be heard alike;" and would not ſuffer him to proceed. His grace departed, not a little diſſatisfied, and formally made complaint of it to the king; who ſilenced him by obſerving, " I verily believe, he would have uſed " me no better, had I gone to ſolicit him in any of " my own cauſes."

The

The following anecdote which ſome have conſidered as an honor to his memory, has by others (with all the confidence of authority) been cenſured, as a reflection on his underſtanding; imputing that to affectation, which evidently reſulted from, what he conceived, the ſtrict obſervance of his duty. A gentleman having a cauſe to try before him, ſent him a buck; but he would not proceed in the trial, until the buck was paid for; which induced the plaintiff to withdraw his record. Does this deſerve the ſeverity of reprehenſion? on the contrary, it ſeems to merit the warmth of commendation.

At Saliſbury, the dean and chapter, in conformity with an eſtabliſhed cuſtom, preſented him with ſix ſugar-loaves; he made his ſervants pay for them, before he would try a cauſe in which the dean and chapter were concerned.

Melancholy is the truth, that the frequency of envy renders it ſo familiar, that it even eſcapes our notice; nor do we reflect upon its turpitude, until we have felt its influence. To ſpread ſuſpicion, requires neither labour, courage, nor expence: and it is eaſy for the author of a lie, however malignant, to eſcape detection, and infamy needs very little induſtry to aſſiſt its circulation. Whether Sir Matthew Hale had excited malice by his eminence, I cannot determine; experience however muſt have convinced him, that the mention of a name which advantageous diſtinction had made eminent, only provoked the aſperity of latent animoſity. This perhaps induced him to recommend the following rules, that we might not only avoid the dangerous depravity, but maintain the dignity of human beings.

" If any man (ſays Sir Matthew) ſpeak any thing " to the diſadvantage or reproach of one that is ab- " ſent, be not too ready to believe it, only obſerve and " remember it; for it may be it is not true, or it is " not all true, or ſome other circumſtances were " mingled with it, which might give the buſineſs re- " ported a juſtification, or at leaſt an allay, an ex- " tenuation, or a reaſonable excuſe: in moſt actions, " if that which is bad alone, or ſeems to be ſo, be re- " ported, omitting that which is good, or the circum- " ſtances that accompany it, any action may be eaſily " miſrepreſented; be not too haſty therefore to be- " lieve a reproach, till you know the truth, and the " whole truth.

" If any perſon report unto you ſome injury done " to you by another, either in words or deeds, do not " be over-haſty in believing it, nor ſuddenly angry with the perſon ſo accuſed; for poſſibly it may be " falſe or miſtaken: and how unſeemly a thing will " it be, when your credulity and paſſion ſhall per- " chance carry you, upon a ſuppoſed injury, to do " wrong to him that hath done you none; or, at leaſt, " when the bottom and truth of the accuſation is " known, you will be aſhamed of your paſſion. Be- " lieve not a report till the party accuſed be heard; and " if the report be true, yet be not tranſported either " with paſſion, anger, or revenge, for that will be " your own torment and perturbation. —— Even when " a perſon is accuſed, or reported to have injured " you, before you give yourſelf leave to be angry, " think within yourſelf, why ſhould I be angry be- " fore I am certain it is true? or, if it be true, how

" can

" can I tell how much I ſhould be angry 'till I know
" the whole matter? Though it may be he hath done
" me wrong, yet poſſibly it is not ſo much as is re-
" preſented; or it was done by miſtake, or it may be,
" he is ſorry for it: I will not be angry 'till I know
" there be cauſe; and if there be cauſe, yet I will
" not be angry 'till I know the whole cauſe; for 'till
" then, if I muſt be angry at all, yet I know not how
" much to be angry: it may be, it is not worth my
" anger; or, if it be, it may be it deſerves but little.
" This will keep your mind and carriage, upon ſuch
" occaſions, in due temper and order, and will diſap-
" point malicious or officious tale-bearers.

" If a perſon be choleric, paſſionate, and give you
" ill language, remember, rather to pity him, than
" to be moved into anger and paſſion with him;
" for moſt certainly that man is in a diſtemper or diſ-
" order: obſerve him calmly, and you ſhall ſee in
" him ſo much perturbation and diſturbance, that you
" will eaſily believe he is not a pattern to be imitated
" by you; and therefore return not choler or anger
" for angry words; for you do but put yourſelf into
" a kind of frenzy, becauſe you ſee him ſo. Be
" ſure you return not railing, reproaching, or reviling
" for reviling; for it doth but kindle more heat; and
" you will find ſilence, or at leaſt very gentle words,
" the moſt exquiſite revenge of reproaches that can
" be; for either it will cure the diſtemper in the
" other, and make him ſee and be ſorry for his paſ-
" ſion, or it will torment him with more perturba-
" tion and diſturbance. But howſoever, it keeps
" your innocence, gives you deſerved reputation of
" wiſdom and moderation, and keeps up the ſerenity

" and compoſure of your mind; whereas paſſion and " anger unfit a man for any thing that becomes him " as a man or a chriſtian."

On the 18th of May, 1671, Sir Matthew was promoted to the dignity of lord chief juſtice of England. —Within five years from this his laſt promotion, he was attacked by the diſorder of which he died. From the firſt moment of his illneſs, he viſibly and haſtily declined; and tho' ſo debilitated that he could ſcarce, even when ſupported, walk, much leſs endure the fatigue of his profeſſion;—yet with painful induſtry he pertinaciouſly diſcharged the different functions of his high office.

Finding his diſorder increaſed by his application, he at length reſolved to retire from the labors of his profeſſion; and therefore humbly ſolicited his ſovereign to accept his reſignation. The king, unwilling to comply with the requiſition, was deſirous that he ſhould continue chief juſtice, on condition that he would tranſact in his own chamber as much of the buſineſs as he poſſibly could: he declined the offer; adding, " I cannot with a good conſcience continue " in office, ſince I am no longer able to diſcharge the " duty belonging to it." His majeſty not well knowing how to deny the requeſt, delayed, however, to comply with it: nay, the chancellor, tho' often requeſted by Sir Matthew, would not move the king to accept his reſignation. Thus ſituated, Sir Matthew on the 21ſt of February, 1675-6, went before a maſter in chancery, with a written inſtrument drawn and engroſſed by himſelf, which he there formally ſealed and delivered, requiring it might be enrolled; he afterwards produced the original to the chancellor, reſigning his office in the following manner.—" Om-

" nibus

" nibus Chriſti fidelibus ad quos præſens ſcriptura
" pervenerit, Mattheus Hale, miles, capitalis juſti-
" ciarius domini regis ad placita coram ipſo rege
" tenenda aſſignatus, ſalutem in Domino ſempiter-
" nam: Noveritis me prefatum Matthæum Hale
" militem, jam ſenem factum, et variis corporis mei
" ſenilis morbis et infirmitatibus dire laborantem
" et adhuc detentum, hâc chartâ meâ reſignare, et
" ſurſum reddere ſereniſſimo domino noſtro, Carolo
" ſecundo, Dei gratiâ Angliæ, Scotiæ, Franciæ, et
" Hiberniæ, regi, fidei defenſori, &c. predictum
" officium capitalis juſticiarii ad placita coram ipſo
" rege tenenda, humillime petens quod hoc ſcriptum
" irrotaletur de recordo. In cujus rei teſtimonium
" huic chartæ meæ reſignationis, ſigillum meum op-
" poſui, dat' viceſimo primo die Februarii, anno regni
" dict'. dom. regis nunc viceſimo octavo."

This he did to teſtify (as himſelf aſſerted) not only his concurrence in the removal, but to obviate an objection, that a chief juſtice, being placed by writ, was not removeable at pleaſure, as judges by patent were.

To thoſe who are unacquainted with our hiſtory, it may ſeem ſtrange, but it is no leſs ſo than true, that the oracles of our law, were formerly dependent on the caprice of the crown: prerogative no doubt thought it neceſſary, but the ſubject found it partial and oppreſſive. Before the cloſe of the ſeventeenth century, and anterior to the glorious revolution, men of pliant diſpoſitions were raiſed to the bench, while thoſe who diſtributed juſtice were removed;---even-handed juſtice gave way to wicked policy;—objects the moſt precious to mankind, were by vicious conſtructions, without ceremony and without fear, ſa-

crificed by thoſe whoſe duty it was to protect them. Sad and melancholy muſt have been the proſpect! for when the channels of public juſtice are corrupted, when juſtice itſelf is converted into the means of revenge, political miſery is arrived at its height. From the numerous inſtances which might be educed in ſupport of the aſſertion, the following one is ſufficient to eſtabliſh it beyond doubt or contradiction. In the year 1683, on the trial of Lord Ruſſel, Jeffreys, in his ſpeech to the jury, turned the untimely fate of Eſſex, into a proof of the conſpiracy in which he and Ruſſell had been engaged: Pemberton, who preſided as chief juſtice, behaved to the priſoner with a candour and decorum ſeldom found in the judges of that reign, or the ſucceeding one. But before Sidney was brought to his trial, Pemberton was removed from the head of the King's-Bench, and even from the privy council, and Jeffreys put in his place (*m*), in order by the fierce-

nſs

(*m*) Jeffreys did not immediately ſucceed Sir Francis Pemberton, whoſe immediate ſucceſſor was Sir Edmund Saunders, a man of too extraordinary a complection to be paſſed over in ſilence. He was originally a ſtrolling beggar about the ſtreets, without either known parents, or relations. He came often to beg ſcraps at Clement's-Inn, where he was taken notice of for his uncommon ſprightlineſs; and as he expreſſed a ſtrong inclination to learn to write, one of the attorney's clerks taught him, and ſoon qualified him for an hackney-writer. He took all opportunities of improving himſelf, by reading ſuch books as he borrowed of his friends; and, in the courſe of a few years, became an able attorney and a very eminent counſel. His practice, in the court of King's-Bench, was exceeded by none: his art and cunning were equal to his knowledge; and he carried many a cauſe by laying ſnares. If he was detected, he was never out of countenance, but evaded the matter with a jeſt, which he had always at hand. He was much employed by the king, againſt the city of London, in the buſineſs of the quo warranto. His perſon was as heavy and ungain, as his wit was alert and ſpright-

no

neſs of his manners, to cope with a man, the vigour of whoſe ſpirit was known throughout Europe (*n*).

In the year 1691, a bill paſſed both houſes to make the ſalaries and offices of the judges for life: but the king, even at that great æra of liberty, refuſed his aſſent, "leaving room for a ſucceeding monarch to "give unaſked to the wiſhes of his people, what "William refuſed to their prayers." However, to maintain the dignity and independence of the judges, it was ſoon after enacted, that their commiſſions ſhould be made (not, as formerly, durante bene placito, but) QUAMDIU BENE SE GESSERINT---their ſalaries were alſo aſcertained and eſtabliſhed, and their removal declared lawful on the addreſs of both houſes of parliament. 13 W. III. c. 2. This law has been ſince greatly improved, in conſequence of that genuine patriotiſm which diſtinguiſhes every public action of his preſent majeſty; who in the beginning of his reign declared from the throne, that "he looked upon the "independence and uprightneſs of the judges, as eſ-"ſential to the impartial adminiſtration of juſtice; as "one of the beſt ſecurities of the rights and liberties "of his ſubjects; and as moſt conducive to the ho-"nour of the crown." And therefore his majeſty moſt earneſtly recommended to his parliament, that the judges might be continued in their offices, DURING THEIR GOOD BEHAVIOUR, NOTWITHSTANDING

ly. He is ſaid to have been "a mere lump of morbid fleſh:" the ſmell of him was ſo offenſive that people uſually held their noſes when he came into the court. One of his jeſts, on this occaſion, was, that "none could ſay he wanted iſſue, for he had no leſs than nine in his back." Sir George Jeffreys ſucceeded him, September 29th, 1683. Vide Grang. Biog. Hiſt. Vol. III. Oct. p. 367.

(*n*) Dalrym. Mem. Gr. Br. p. 91. 95.

ANY DEMISE OF THE CROWN. This the parliament immediately took into conſideration, and, with all poſſible diſpatch, paſſed a law, in every reſpect conformable with his majeſty's recommendation. Vide 1 Geo. III. c. 23.

Charles, wearied with applications, at length, but with the greateſt reluctance, accepted Sir Matthew's reſignation; at the ſame time aſſuring him, that "he "ſhould ſtill look on him as his oracle, and have re-"courſe to his advice when his health would permit, "and that he ſhould continue his ſalary during life." This inſtance of royal beneficence Sir Matthew thought too great, and therefore wrote to the lord treaſurer, earneſtly requeſting that it might only be during pleaſure; but the king inſiſted on granting it for his life.

Sir Richard Rainsford, who was but a ſecondary character in his profeſſion, had the diſadvantage of ſucceeding Sir Matthew, who was confeſſedly at the head of it. The merit of Rainsford, eclipſed by the ſuperior luſtre of his predeceſſor, appeared to be much leſs than in reality it was.—Let it not however be forgotten, that he as much excelled Sir William Scroggs, who ſucceeded him, in point of integrity, as he was below Sir Matthew Hale in point of learning. When the commiſſion was delivered to Sir Richard Rainsford, the chancellor reminded him—that the very labours of the place, the weight and fatigue which attended it, were no ſmall diſcouragements; "for," continued the chancellor, "what ſhoulders may not "juſtly fear the burthen, which made him ſtoop who "went before you? Yet I confeſs, you have a greater "diſcouragement than the mere burthen of the "place,

" place, in the inimitable example of your predeceſ-
" ſor: a chief of indefatigable induſtry, invincible
" patience, exemplary integrity and magnanimity, and
" ſo abſolute a maſter in the ſcience of law."

To this encomium, not the language of panegyric, but the effuſion of truth, chief juſtice Rainsford anſwered, " I have been witneſs to the greatneſs of his
" learning, which charmed his auditors to reverence
" and attention; he is a perſon of whom I may bold-
" ly ſay, that as former ages cannot ſhew any ſupe-
" rior, ſo I am confident ſucceeding times will never
" ſhew an equal. Theſe conſiderations, heightened
" by what I have heard from your lordſhip, make me
" anxious how I ſhall ſucceed ſo good, ſo great a man;
" one who will be eminently famous to all poſterity."

To return to our author: ſo far from enjoying repoſe by relaxation, his diſorder rather increaſed than diminiſhed from the time of his reſignation; and notwithſtanding his recovery now became impoſſible, yet firm in his faith, and noble in his mind, he ſupported himſelf with an uncommon but happy equanimity. In the excruciating moments of pain, he forbore complaint, and when at his devotions was fervent and compoſed. Not long before his death, the divine who attended, informed him, that the ſacrament was to be adminiſtered at the church; but as he could not, through the ſeverity of illneſs, go there, it ſhould be adminiſtered to him in his own houſe. " No," (ex-
" claimed Sir Mathew) my heavenly Father has pre-
" pared a feaſt for me, and I will go to my Father's
" houſe to partake of it." He was carried thither, where he received the ſacrament with all the fervency of chriſtian piety,

His

His whole powers were now engroſſed by the conſideration of another ſtate, and all converſation was now tedious, which had not ſome tendency to diſengage him from human avocations, and expand his proſpects into futurity.—That he had ſome unaccountable preſage of his death, is (if credit may be given to epiſcopal authority) unqueſtionably true. But an aſſertion of this kind, in an age ſo liberal as the preſent, may appear very problematical.—Burnet has been bold enough to publiſh it;—few perhaps will give credence to the learned biſhop: and tho' every one may be allowed to be ſomewhat ſceptical on the ſubject, yet ſurely it would not have been proper to have ſuppreſſed ſo peculiar an anecdote, eſpecially when announced by ſo ſound a divine.

"He had (ſays Burnet) ſome ſecret unaccountable "preſages of his death; for he ſaid, that if he did "not die on ſuch a day (which fell to be the 25th of "November,) he believed he ſhould live a month "longer; and he died that very day month."

Henry the Great had a ſimilar preſcience, which the duke of Sully, who cannot be thought either a credulous or a weak man, has noticed in a very particular manner (*o*). Other inſtances, equally cogent, might

(*o*) Quel jugement porterons-nous ſur les noirs preſſentimens, qu'il n'eſt que trop conſtant que ce malheureux Prince eut de ſa cruelle deſtinée? Ils ſont d'une ſingularité, qui a quelque choſe d'effrayant. J'ai déja rapporté avec quelle répugnance il s'étoit laiſſe aller à permettre que la cérémonie de couronnement de la Reine ſe fît avant ſon départ. Plus il en voyoit approcher le moment, plus il ſentoit la frayeur & l'horreur redoubler dans ſon cœur.—Il venoit l'ouvrir tout entier à moi, dans cet état d'amertume & d'accablement dont je le reprenois comme d'une foibleſſe impardonnable. Ses propres paroles feront une toute autre impreſſion, que tout ce que je pourrois dire: "Ah! mon ami, me diſoitil, que "ce ſacre me déplait! je ne ſcais "ce que c'eſt; mais le cœur me "dit

might no doubt be ſelected; yet in ſuch points, it is better to reſt in the prudent ſtate of neutrality, without engaging aſſent to either the one ſide or the other. Such an hovering faith as this, which refuſes to ſettle upon any determination, is abſolutely neceſſary in a mind that is careful to avoid errors and prepoſſeſſions. When the arguments preſs equally on both ſides, in matters

" dit qu'il m'arrivera quelque " malheur." Il s'aſſeyoit en diſant ces paroles, ſur une chaiſe baſſe, que j'avois fait faire exprès pour lui, et qui ne partois point de dédans mon cabinet; et livré à toute la noirceur de ſes idées, il frappoit des doigts ſur l'étui de ſes lunettes, en rêvant profondément: s'il ſortoit de cette rêverie, c'étoit pour ſe lever bruſquement, en frappant des mains ſur ſes cuiſſes, & pour s'écrier: " Par dieu! je mour- " rai dans cette ville, je n'en " ſoirtrai jamais; ils me tuëront; " je vois bien qu'ils mettent toute " leur derniere reſſource dans ma " mort: Ah! maudit ſacre! tu " ſeras cauſe de ma mort. Mon " dieu! Sire, lui dis je un jour, à " quelle idée vous livrez vous la? " Si elle continuë, je ſuis d'avis " que vous rompiez ce ſacre & " couronnement, & voyage & " guerre: Le voulez vous? Cela " ſera bien tôt fait."—Oui, " me dit-il, enfin, après que je lui eus tenu ce même diſcours deux ou trois fois, " Oui, rompez le ſacre, " & que je n'en entende plus " parler: j'aurai par ce moyen " l'eſprit guéri des impreſſions " que quelques avis y ont fai- " tes; je ſortirai de cette ville, " & ne craindrai plus rien." A quel trait reconnoîtra-ton ce cri ſecret & importun du cœur, ſi on le méconnoît à ceux cy? " Je ne " veux point vous celer, me di- " ſoit-il encore, qu'on m'a dit " que je devois être tuè à la " premiere magnificence, que je " ferois, & que je mourrois dans " un carroſſe; & c'eſt ce qui fait " que j'y ſuis ſi peureux —Vous " ne m'aviez ce ſemble jamais " dit cela, Sire, lui répondis-je. " Je me ſuis pluſieurs fois étonné, " en vous entendant crier dans " un carroſſe, de vous voir ſi " ſenſible à un ſi petit danger; " après vous avoir vu tant de fois " intrepide au milieu des coups " de canon, & de mouſquet, & " parmi les piques & les epées " nuës. Mais puiſque cette opi- " nion vous trouble juſqu' a ce " point; en votre place, Sire, je " partirois dès demain: Je laiſſe- " rois faire le ſacre ſans vous, ou " je le remettrois á une autre fois; " & de long temps je ne rentre- " rois, ni dans *Paris*, ni dans " aucun carroſſe. Voulez-vous " que j'envoie tout à cette heure " à *Notre-Dame* & à *Saint-Denis*, " faire tout ceſſer, & renvoyer les " ouvriers.—Je le veux bien, me " dit encore ce Prince: mais que " dira ma Femme? car elle a " merveilleuſement ce ſacre en " tête,

matters that are indifferent to us, the ſafeſt method is to give up ourſelves to neither (*p*).

Conſonant with the prediction, if ſuch a prediction ever was declared, all that was mortal of Sir Matthew Hale felt the ſtroke of diſſolution, on the 25th of December, 1676.

" Whoever would know how much piety and virtue ſurpaſs all external goods, might here have ſeen them weighed againſt each other, where all that gives motion to the active, and elevation to the eminent, all that ſparkles in the eye of hope, and pants in the boſom of ſuſpicion, at once became duſt in the balance, without weight and without regard."

His remains were interred in the cemetery of Alderly, among thoſe of his anceſtors. This was done in conformity with his own ſentiments. He did not approve of the mode of burying in churches; becauſe, as he was often heard to ſay, " churches

" tête. Elle dira ce qu'elle " voudra," repris je, voyant combien ma propoſition avoit fait de plaiſir au Roi: " mais je ne " ſcaurois *croire*, que quand elle " ſçaura la perſuaſion où vous " êtes, qu'il doit être la cauſe de " tant de mal, elle s'y opiniâtre " d'avantage."

Je n'attenois point d'autre ordre, pour aller donner celui d'interrompre les préparatifs du couronnement. Ce n'eſt qu'avec un véritable regret, que je me vois obligé de dire, que quelques efforts que je fiſſe, je ne pus jamais engager la Reine à donner cette ſatisfaction à ſon époux. Je paſſe ſous ſilence les ſollicitations, les prières & les conteſtations, que j'employois pendant trois jours entiers, pour tâcher de la fléchir. Ce fut à ce prince à céder: & comme après tout il étoit le premier dans certains momens, à ſe reprocher à lui-même ſes frayeurs; il ceſſa de m'en parler, & de m'en faire parler à la Reine. Les ouvriers furent mis pour la ſeconde fois en beſogne: mais *Henry* n'en revint pas moins fortement á ſes premieres apprehenſions, qu'il m'exprimoit ordinairement par ces paroles-cy, qu'il avoit ſouvent dans la bouche; " Ah! mon " ami, je ne ſortirai jamais de " cette ville; ils me tuëront ici. " O maudit ſacre! tu ſeras la " cauſe de ma mort." Je n'ai pas dû oublier ces triſtes paroles. Vide *Mem. de Sul.* Tom. III. 4to. p. 226. Edit. 1747.

(*p*) *Spectator*, No. CXVII.

" are

" are for the living, and church-yards for the dead." On his monument, reſembling himſelf in plainneſs and decency, is this inſcription:---

HIC INHUMATUR CORPUS
MATTHEI HALE, MILITIS,
ROBERTÆ HALE, ET JOANNÆ
UXORIS EJUS, FILII UNICI;
NATI IN HAC PAROCHIA DE ALDERLY,
PRIMO DIE NOVEMBRIS;
A. D. 1609.
DENATI VERO IBIDEM
VICESIMO QUINTO DIE DECEMBRIS,
A. D. 1676.
ÆTATIS SUÆ LXVII. (q)

Virtues which once were envied, as Horace obſerves, becauſe they eclipſed thoſe of others, can now no longer obſtruct reputation, of conſequence no one can have any intereſt in the ſuppreſſion of their praiſe. The pen of Plutarch is only competent to the delineation of a character ſo elevated as that of Sir Matthew Hale; and therefore, though the following ſhould be conſidered only as an attempt, yet is it diſmiſſed with fear and trembling.

He ſeemed from his youth to have acquainted himſelf with wiſdom and with knowledge; his virtue was not inferior to his learning; and as humility always accompanied the former, ſo was modeſty ever attendant on the latter: and, notwithſtanding the variety of his avocations, he daily preſſed nearer to

(q) Though there is the utmoſt ſimplicity in the words of this inſcription, yet there appears a certain air of dignity in them, owing to the feet that compoſe them, which are all of the moſt generous quality. MASON.

per-

perfection by a devotion, which tho' elevated was rational, and though regular was warm.

In his profeſſion he was an ornament to the bar, and an acquiſition to the bench---for his judgment was clear, his opinion was authority; and notwithſtanding he conſcientiouſly diſcharged the duties of his profeſſion, he at the ſame time diſregarded the profits which reſulted from it. When at the bar, intereſt could neither induce him to ſupport chicane, nor to proſtitute his abilities; and tho', while there, civil war raged with all the violence of contention, yet he not only preſerved his integrity, but lived in eaſe and ſecurity: actuated by the noble example of Pomponius Atticus, he walked thro' times of the moſt turbulent diſtraction, uncenſured, unhurt.---

On the bench,——

——————————" he reign'd,
" In a ſuperior ſphere of cloudleſs day,
" A pure intelligence"——

Here he was all patience; and tho' the temper of the times too often made innovations in the profeſſion, yet he never gave way to injuſtice, however formidable, but at all times looked forward to the laſting, incorruptible judgment of poſterity.---He held equity to be, not only part of the comman law, but alſo one of its principle grounds; for which reaſon he reduced it to principles, that it might be ſtudied as a ſcience (*r*).

His abilities were ſo very extenſive, that it is almoſt incredible that one man, in no great ſpace of time, ſhould acquire ſuch variety of knowledge;

(*r*) See his Analyſis.

but

but when we reflect that his parts were lively, and his apprehenſion quick; that his memory was great, his judgment ſound, and his application indefatigable; the myſtery is unravelled, and admiration increaſes, as incredulity paſſes away.

With ſuch virtues and ſuch abilities, had he been inſenſible to that generous applauſe which was juſtly and liberally beſtowed upon him, it might have been adduced either as an inſtance of weakneſs or affectation. On the contrary he had a becoming ſenſe of the eſteem in which he was held, which muſt have been attended with that ſelf-approbation which ever accompanies the accompliſhment of great and worthy actions.---So far from being inordinate, the conduct was laudable—very different from, if not the reverſe of vanity, which is the natural weakneſs of ambition. For this conſiſtent approbation, he is unjuſtly repreſented as a vain perſon by Mr. Roger North (*s*), who by endeavouring to depreciate an exalted and an eſtabliſhed character, has only degraded his own.

Though religion is the moſt animating perſuaſion that the mind of man can embrace—though it gives ſtrength to our hopes and ſtability to our reſolutions—tho' it ſubdues the inſolence of proſperity, and draws out the ſting of affliction; yet ſuch was the profligacy of the reign of Charles II.—ſo far removed from ſound policy and from good manners, that, at this period of eaſe and politeneſs, religion

(*s*) In the reign of *Charles* II. *North* was a barriſter of diſtinguiſhed abilities, and in the ſucceeding reign was made Attorney General. He was was a near relation of the Lord Keeper *Guildford*, with whom he chiefly ſpent the active part of his life. He was author of the lives of *Francis* Lord *Guildford*, Lord Keeper; of Sir *Dudley North*; and of Dr. *John North*. Maſter of *Trinity College, Cambridge*.

was

was not only groſsly neglected, but was daily exhibited as an object for the exerciſe of ridicule. To leſſen that veneration which is due to religion, is a kind of zeal which no epithet is ſufficient to ſtigmatize;—it is attacking the ſtrongeſt hold of ſociety, and attempting to deſtroy the firmeſt guard of human ſecurity. So alarming was this advance of impiety to Sir Matthew, that he often deplored it with unaffected ſorrow.—Were it neceſſary to evince his abhorrence of it, I might content myſelf with appealing to the bright example of his life; but however ſufficient that might be for the purpoſe, it would yet be doing great injuſtice to his memory not to mention, that he employed ſome time in elegant inſtructive diſquiſition on the moſt intereſting topics of the chriſtian religion. Minutely obſervant of the rituals of devotion, he was, perhaps, ſingular in his deportment; but let it not be forgotten, that he for a long time concealed the conſecration of himſelf to the ſtricter duties of religion, leſt by ſome adventitious action he ſhould bring piety into diſgrace.

From hence it ſhould ſeem, that he held nothing neceſſary but his duty, nothing amiable but integrity, nor any thing ſhameful but what was vicious. By being ingenuous, he not only ſecured his independency, but raiſed himſelf above flattery or reproach, above menace or misfortune. Thus the rectitude of his conduct, added to the greatneſs of his abilities and the eaſe of his deportment, not only gained him univerſal reſpect, but rendered him more conſpicuous than any of his contemporaries.

Inner Temple,
Feb. 1ſt, 1779.

POSTSCRIPT.

IT is laudable to reſpect ſuch as are nobly deſcended, not merely from gratitude to thoſe who have benefited ſociety, but that others may be animated to follow their example: however laudable ſuch attention may ſeem, yet as it is an honour from courteſy, and not of right, it muſt therefore be received, and cannot be demanded. Burnet, ſpeaking of Sir Matthew Hale, ſays, "in after times, it is not to "be doubted, but it will be reckoned no ſmall "honour to derive from him;" which induced me to ſubjoin the ſucceeding narrative.

Hale was twice married: his firſt wife was Ann, daughter of Sir Henry Moore, of Fawley in Berkſhire, grand-child to Sir Francis Moore, ſerjeant at law: by her he had many children. (a)

His eldeſt ſon (Robert) married Frances, daughter of Sir Francis Chock, of Avington, in Berkſhire; by whom he had five children; Matthew, Gabriel, Ann, Mary and Frances.

His ſecond ſon (Matthew) married Ann, daughter of Mr. Matthew Simmonds, of Hilſley in Gloceſterſhire; by whom he had one ſon, named Matthew.

His third ſon (Thomas) married Rebekah, daughter of Mr. Chriſtian le Brune, a Dutch merchant; but died without iſſue.

(a) *i. e.* Ten.—Four of them died when very young.

His fourth ſon (Edward) married Mary, daughter of Edmond Goodyere, Eſq. of Heythorp, in Oxfordſhire; by whom he had two ſons and three daughters.

His eldeſt daughter (Mary) married Edward Alderly, Eſq. of Inniſhannon in the county of Cork in Ireland, who dying, left her with two ſons and three daughters. She afterwards married Edward Stevens, Eſq. of Cherrington in Gloceſterſhire.

His youngeſt daughter (Elizabeth) married Edward Webb, Eſq. barriſter at law; ſhe died, leaving two children.

His ſecond wife was Ann, the daughter of Mr. Joſeph Biſhop, of Fawley in Berkſhire, by whom he had not any iſſue.

It may not be improper alſo to mention, that Sir Matthew gave to the ſociety of Lincoln's-Inn the moſt valuable of his manuſcripts. As they are principally profeſſional, and perhaps unknown to many, I do not think that any apology is neceſſary for enumerating them, or tranſcribing that part of the will which relates to the bequeſt.

" Item, as a teſtimony of my honour and reſpect " to the ſociety of Lincoln's-Inn, where I had the " greateſt part of my education, I give and be- " queath to that honourable ſociety, the ſeveral " manuſcript books contained in a ſchedule annexed " to my will: they are a treaſure worth having and " keeping, which I have been near forty years in " gathering with very great induſtry and expence. " My deſire is, that they be kept ſafe and all toge- " ther, in remembrance of me; they were fit to be " bound in leather and chained, and kept in archives:

" I deſire

" I deſire they may not be lent out or diſpoſed of: " only if I happen hereafter to have any of my poſ- " terity, of that ſociety, that deſires to tranſcribe any " book, and give very good caution to reſtore it " again in a prefixed time, ſuch as the benchers of " that ſociety in council ſhall approve of; then, and " not otherwiſe, only one book at one time may be " lent out to them by the ſociety; ſo that there be " no more but one book of thoſe books abroad out " of the library at one time. They are a treaſure " that are not fit for every man's view; nor is every " man capable of making uſe of them: only I would " have nothing of theſe books printed, but intirely " preſerved together for the uſe of the induſtrious " learned members of that ſociety."

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An old regiſter, and ſome pleas, 1 vol.

Bernardi Bratrack peregrinatio, 1 vol.

Iter Cantii & London, and ſome reports tempore E. 2. 1 vol.

Reports tempore E. 1. and E. 2. 1 vol.

Leiger book, Abbatiæ de bello.

Iſidori opera.

Liber altercationis & Chriſtianæ philoſophiæ contra paganos.

Hiſtoria Petri Manducatorii.

Hornii aſtronomica.

Hiſtoria eccleſiæ Dunelmenſis.

Holandi chymica.

De alchymiæ ſcriptoribus.

The black book of the new law, collected by me, and digeſted into alphabetical titles, written with my own hand, which is the original copy.

(Signed)

Matthew Hale.

THE ANALYSIS OF THE LAW.

SECT. I.

Of the civil part of the law, IN GENERAL.

THE civil part of the law concerns,
Civil rights or intereſts;
Wrongs or injuries relative to thoſe rights:
Relief, or remedies, applicable to thoſe wrongs.

Now all civil rights, or intereſts, are of two ſorts;—
Jura perſonarum, rights of perſons: or,
Jura rerum, rights of things.

The civil rights of perſons are ſuch as do either,
Immediately concern the perſons themſelves; or,
Such as relate to their goods and eſtate.

As to the perſons themſelves, they are either,
Perſons natural; or,
Perſons civil or politic; i. e. bodies corporate.

Perſons natural are conſidered two ways:
Abſolutely and ſimply in themſelves; or,
Under ſome degree or reſpect of relation.
Vide ſect. 2.

In perſons natural, ſimply and abſolutely conſidered, we have theſe ſeveral conſiderations, viz.

The INTEREST which every perſon has in himſelf.

Their CAPACITIES, or ABILITIES, which reſpect their actions.

The intereſt which every perſon has in himſelf, principally conſiſts in three things, viz.

The intereſt he has in the ſafety of his own perſon. And the wrongs that reflect upon that, are, aſſaults—affrays—woundings.

The intereſt he has in his liberty, or the freedom of his perſon. The injury whereto, is dureſs, and unlawful impriſonment.

The intereſt he has in his name and reputation. The injury whereto is ſcandal and defamation.

As to the other intereſt of goods and eſtate, though in truth they have a habitude, and are under ſome reſpect to the perſon; yet becauſe they are in their own nature things, ſeparate and diſtinct from the perſon, they will more properly come in under jura rerum. Vide ſect. 23, &c.

The CAPACITY that every perſon has; which is a power that THE LAW variouſly aſſigns to perſons, according to the variety of certain conditions, or circumſtances, wherein they are, either TO TAKE, or TO DISPOSE.

And under this head we have,

Firſt, the capacities themſelves, which are eſpecially two;

Capacities which a man has in his own right:

Capacities which he has in auter droit, or another's right.

Now capacities which a man has in his own right, are either,—

To acquire or take;

To alien or transfer.

And both theſe are either,

Of things perſonal;

Of things real.—

The

The ſecond kind of capacities are IN AUTER DROIT,—another's right; as executors, corporations, ceſtuy que uſe, &c. whereof hereafter.

The various conditions or circumſtances of perſons, with relation to thoſe capacities, conſiſting of,

Ability.

Non-ability.

And all perſons are preſumed in law able in either of thoſe former capacities of taking, or diſpoſing, who by law are not diſabled: and thoſe that are ſo diſabled come under the title of non-ability, though that non-ability is various in its extent, viz. to ſome more, to ſome leſs; as in the ſeveral inſtances following.

ALIENS: here comes in the learning of aliens, as naturalization, denization, &c.

ATTAINTED of treaſon or felony; here of attainders.

Perſons OUTLAWED in perſonal actions.

INFANTS;—here of the non-ability of infants. Bacon's Hiſt. part 1. p. 88.

FEME COVERTS; here of their diſability.

IDEOTS and LUNATICS; here of that learning. Vide § 14.

Perſons under ſome ILLEGAL reſtraint or force, as dureſs, maneſs.

VILLEINS; (now antiquated,)

BASTARDS; and here of legitimation. Vide § 18.

SECT. II.

Of the relation of perſons, and the rights thereby ariſing.

NOW as to perſons conſidered in reſpect of relation, the rights thereby ariſing are of three kinds, viz.

Political.

Œconomical;
Civil.

The political relation of perſons, and the rights emergent thereupon are,

The magiſtrate;
The people or ſubject.

The magiſtrate is either,

Supreme;
Subordinate.

The ſupreme magiſtrate is either,

Legiſlative: THE PARLIAMENT. (With whoſe rights I ſhall not here intermeddle.)
Executive: THE KING.

And in as much as the king is by the law the head of the kingdom and people, the laws of the kingdom, eo intuitu, have lodged in him certain rights, the better to enable him to govern and protect his people. And although under this conſideration I ſhall be conſtrained to take in and include many rights of things; yet becauſe they do belong to the king under this relation, AS KING, and I have no other place or diviſion ſo apt to diſpoſe of them as this, I ſhall here bring them in together.

And the rights that belong to the king, as king, are of two kinds;

Such rights as concern his perſon:
Such rights as concern his prerogative.

Of each of theſe in their order.

SECT. III.

Of ſuch rights as relate to the king's perſon.

THE rights which more immediately concern the king's perſon, include theſe two things, viz.

The

The manner of his title, or acqueſt thereof.
The capacities of the king.

The manner of acqueſt of the regal title, or dignity, is either,

A lawful acqueſt; or,
An unlawful acqueſt.

An hereditary acqueſt of title, is by the municipal laws and conſtitutions of this kingdom; when the crown deſcends to the next of blood, according to the laws and cuſtoms of England in caſes of hereditary deſcents.

And here all thoſe rules that have been obſerved in the law touching this point, may be inſerted.

An unlawful acqueſt of the regal title is,—

By uſurpation; when a ſubject by wrong invades the crown, or intrudes upon him who has the lawful right thereto; as was done by king Stephen, king John, Henry the fourth, and Richard the third.

And herein may be conſidered what power the law allows to ſuch an uſurper, and what it denies him.

By conqueſt; when a foreigner either, Victoria in regem
Vanquiſhes the king, as William the firſt did Harold.
Or ſubjects the kingdom; which never happened with reſpect to England ſince the Romans. Victoria in populum.

The king's capacity, as he is king, is of two kinds.

His political capacity.
His natural capacity.

As to his political capacity; he is A SOLE CORPORATION, of a more tranſcendant nature and conſtitution than other corporations; whereby he is diſcharged from many incapacities, which in the caſe of other perſons would,—

Obſtruct his ſucceſſion, as alienee, &c.
Diſable his actions, as infancy, or coverture in the caſe of a queen, &c.

Then as to his natural capacity, as he is king; the great concerns of government requiring a great aſſiſtance to the king's natural capacity, the laws and cuſtoms of the kingdom have furniſhed him with divers aſſiſting councils, which are of two kinds, viz.

His ordinary councils.
His extraordinary councils.

His ordinary councils are three, viz.

Privatum concilium, his privy council.

And here may be taken in, all ſuch laws as direct, bind, or limit, the privy council; either,

In matters of public intereſt touching the king;

Or in matters of private intereſt between party and party.

Legale concilium, or his council at law; which conſiſting of the lord chancellor, lord treaſurer, lord privy ſeal, judges of both benches, barons of the exchequer, maſter of the rolls, &c. is the king's council of advice in matters of law.

Concilium militare, his council in time of war, or public hoſtility, viz.

In matters at land, { earl conſtable. / earl marſhal.

In matters at ſea, the lord admiral.

The juriſdiction of whom, vide poſt.

The king's extraordinary councils are of two kinds;

Secular, or, temporal:
Eccleſiaſtical, or, ſpiritual.

The king's extraordinary ſecular councils are, the houſe of peers; the houſe of commons; in their capacity of informing, adviſing, and counſelling the king in matters that are,

Public benefits;
Public grievances.

And here all the learning of parliaments properly comes in, viz. the perſons of whom it conſiſts;

ſiſts; the members of each houſe; the manner of their ſummons; the places that ſend members to the houſe of commons; and how to be qualified; how elected; the qualifications of the electors; what the privileges of parliament are; the method of paſſing bills, &c. and how adjourned, prorogued or diſſolved.

The extraordinary eccleſiaſtical councils are,

The upper houſe } of convocation.
The lower houſe }

And hither may be referred all laws and conſtitutions touching the convocation.

SECT IV.

Concerning the prerogatives of the king.

HAVING ſhewn you what rights belong to the king's perſon, we come now to thoſe rights which concern his prerogative.

And thoſe prerogatives are of two kinds:

Direct and ſubſtantive prerogatives.
Incidental and relative prerogatives.

The direct and ſubſtantive prerogatives may be diſtributed under three branches, viz.

Jura Majeſtatis, vel Summi Imperii, i. e.
The right of dominion.
Poteſtas Juriſdictionis, vel Mixti Imperii, i. e.
The power of juriſdiction.
Cenſus Regalis, or, the royal revenues.

Which I ſhall ſubdivide according to their order.

See the incidental and relative prerogatives in ſect. 9.

SECT. V.

Concerning the king's rights of dominion or power of empire.

THE Jura Summæ Majeſtatis, or rights of the king's empire or dominion, are either,
In relation to his own ſubjects; or,
In relation to foreigners.

In relation to his own ſubjects, they reſpect,
Times of peace.
Times of war.

And firſt, of the rights of dominion, which reſpect times of peace.

Theſe rights, though they are exerciſable alſo in times of war and inſurrection, yet ſeeing they do more immediately reſpect the well-ordering of a kingdom, and preſerving its peace and tranquility, I ſhall here inſert them. And though they are various in their kinds, and ſome of them ſeem to refer to the powers of juriſdiction, yet I ſhall endeavour to reduce them to theſe eight heads following, viz.

His rights in relation to the laws.
In relation to tributes and public charges.
In relation to the public peace of the kingdom.
In relation to public injuries and oppreſſions.
In relation to public annoyances.
In relation to his conſtituting the great officers of the kingdom.
In relation to his ordering and regulating trade and commerce.
In ſuperviſing, regulating, and ſupplying the defects of others.

Firſt, in relation to the laws of this kingdom:
In the making of laws.
In the relaxation of laws.

As to the making laws, his right conſiſts in three particulars:

In

In the making of ſtatute laws, or acts of parliament; for though the kihg cannot make ſuch laws himſelf without the conſent of both houſes of parliament, yet no law can be made to bind the ſubject without him.

In the making of ſpiritual laws, or canons eccleſiaſtical, which, if kept within the bounds of eccleſiaſtical conuzance, are admitted here in this kingdom: as theſe laws cannot be made without the king's conſent, ſo neither can the king ordain ſuch laws without the clergy in convocation aſſembled.

So that in both theſe kinds of laws, the king's power of making is only a qualified and coordinate power. But,

In making and iſſuing of proclamations, which in ſome inſtances are to be taken for laws, as in calling parliaments, declaring war; &c. herein the king's power is more abſolute, as being made by him alone; yet the king cannot by theſe introduce a new law, ſo as to alter or transfer properties, or impoſe new penalties or forfeitures beyond what are eſtabliſhed by ſtatute or common law.

And as to his power in the relaxation of laws already made, it reſpects either,

Temporal laws; which being enacted by parliament, the king cannot abrogate or annul ſuch a law: but in ſome caſes of penal laws, he may, in reſpect of perſons, times, or places, ſometimes DISPENSE with them. (*a*)

Here may come in all the learning touching diſpenſations and non obſtantes.

Eccleſiaſtical laws, wherein the king has a greater latitude of diſpenſation; for if ſuch laws are not confirmed by parliament, the king

(*a*) The diſpenſing power of the crown was aboliſhed at the time of the revolution. See Hume's Hiſt. Eng. 8 v. oct. 240, 244, 245, 247, 249. and Blac. Com. 1 v. oct. 142, 186, 342. 4 v. oct. 436, 440. See alſo 1 W. & M. ſt. 2. c. 2.

may

may revoke and annul them AT HIS WILL and pleaſure.

And here all the learning of Commendams, diſpenſationes ad plura, and all eccleſiaſtical defects and incapacities diſpenſed with by the king, fall under conſideration.

Secondly, in relation to tributes and public charges, wherein is conſidered,

What charges he cannot impoſe without conſent of parliament; and for this, ſee the ſtatute de Tallagio non concedendo, and divers other ſtatutes, reſtraining new impoſitions.

What charges he MAY impoſe without conſent of parliament, viz. reaſonable tolls; as pavage, pontage, murage, &c.

And here may be conſidered the lawfulneſs of tolls, &c.

And of exemptions from them, { By preſcription. / By charter.

Thirdly, in relation to the public peace of the kingdom.

1. In preſerving it from being broken:

By inhibitions from going, or riding armed.

By erecting or razing caſtles and fortifications.

By prohibiting ſuch erections by others.

2. In reſtoring it when broken:

By ſuppreſſing affrays and tumults WITH FORCE.

By a legal proſecuting and puniſhing ſuch affrayors.

Fourthly, in relation to public injuries and oppreſſions.

By reſtraining them by impriſonment.

And herein conſider by whom, where, when, and how, this may be done.

By proſecuting them in the king's name;

By indictment.

By information.

By pardoning them, as to the king's proſecution.

And

And herein, of pardons, what may be pardoned, when, how, and by what words, &c.

Fifthly, in relation to public annoyances: for the king has the great care thereof; and the proſecution and puniſhment of the ſame, as far as they are public, is by law committed to him.

And this is commonly exerciſed about bridges, ferries, highways, &c.

Though theſe particulars, and ſome of the foregoing, more regularly come in under pleas of the crown, and criminal matters, in the ſecond part of this treatiſe.

Sixthly, in relation to his conſtituting great officers, viz.

CIVIL OFFICERS, as lord chancellor, treaſurer, privy-ſeal, earl marſhal, lord admiral, judges. &c.

And here may be conſidered,

The manner of their conſtitution.

Their office, buſineſs, or employment.

ECCLESIASTICAL OFFICERS, as archbiſhops, biſhops, deans, archdeacons, &c.

And here may come in,

The manner of their conſtitution;—as their election, conſecration, inveſtiture, reſtitution of temporalties, &c.

The exerciſe of their office; viz. how far the king may enlarge, limit, or reſtrain it.

Seventhly, in relation to the regulation of trade and commerce.

1. His right of { Coining new monies, / Authenticating foreign coin.

And here comes in all matters touching the variety and legality of coins; and of contracts, orders, and inſtructions, relating to it.

2. His deſignation of places of public commerce;

As ports, fairs, markets.

And here of ſuch various learning as relates thereto;

As

As how they are created { By charter. / By preſcription.

What is a good grant thereof; and what not, if granted to the prejudice of another; and of the writ ad quod Damnum.

Alſo what is a ſale in market overt, and of the effects thereof in altering properties, &c. and of foreſtalling, as when a market may be foreſtalled, and when not.

3. His right in inſtituting and regulating the inſtruments of public commerce, with reſpect to

Undue { Weights. / Meaſures.

Exceſſive prices, &c.

Eighthly, in relation to his ſuperviſing, regulating, and ſupplying the neglects or defects of other giſtrates;

Of CIVIL magiſtrates { By writs of error. / By writs of appeal, &c.

Of ECCLESIASTICAL magiſtrates; by devolution,

Of cauſes, by appeal to him.

Of preſentations, by lapſe.

Thus far of the king's prerogatives, with reſpect to peace; next of thoſe that relate to war and commotions.

Theſe may be termed jura militiæ, and conſiſt,

In raiſing men.

In building forts.

And regard either,

Domeſtic inſurrections of his ſubjects: or,

Foreign hoſtilities of enemies.

With regard to his ſubjects,

He may raiſe men to ſuppreſs their inſurrections by force.

He may puniſh them by martial law during ſuch inſurrection or rebellion, but not after it is ſuppreſſed.

In relation to foreigners:—theſe rights are to be conſidered, viz.

The

The power of denouncing war, and concluding peace.
And herein leagues and truces may be conſidered, with their various effects.
Alſo what ſhall be ſaid an enemy.
The authorizing of,
Public envoys;
Ambaſſadors: and,
Plenipotentiaries.
The power of granting or iſſuing letters of marque and reprizal.
And herein conſider the inducements, ends and effects thereof.
The power of granting ſafe conducts.
And here of the uſes and effects thereof.

SECT. VI.

Of the poteſtas juriſdictionis; *or, the king's right or power of juriſdiction.*

HITHERTO of the jura ſummi imperii, or rights of empire or dominion; now we come to the jura mixti imperii, or poteſtas juriſdictionis, wherein the king generally acts by his delegates, officers or repreſentants.

This poteſtas juriſdictionis, or power of juriſdiction, ſeems principally to be of two kinds, viz.
Extraordinary.
Ordinary.

The extraordinary power of juriſdiction reſiding in the king, though for the moſt part exerciſed by his officers and miniſters, conſiſts in three things;
In commanding home any of his ſubjects from foreign parts;
In prohibiting any of his ſubjects from going beyond the ſeas:
1. By proclamation.

2. By

2 Inſt. 47, 48.

2. By the ſpecial writ of ne exeat regnum.

In commanding any of his ſubjects to undertake an office or dignity within the realm.

And here the learning touching theſe may be inſerted; as where, when, and how theſe commands or inſtructions are to iſſue; and when, and in what caſes NOT; what the penalty if not obeyed, and in what manner inflicted.

The king's ordinary or uſual power of juriſdiction, is of two kinds:

Eccleſiaſtical.

Temporal or civil.

Ordinary ECCLESIASTICAL juriſdiction, or rather juriſdiction touching eccleſiaſtical matters, anciently belonged to the crown, but was for ſome time uſurped by the pope; ſo by the ſtatute of 26 Hen. VIII. it was again reſtored to the crown.

And this is of two kinds;

Voluntary juriſdiction.

Contentious juriſdiction.

Eccleſiaſtical VOLUNTARY juriſdiction, may be exerciſed by the king in ſeveral inſtances relating to eccleſiaſtical matters: as,

In convening eccleſiaſtical aſſemblies, as ſynods, convocations, &c.

In ſuch acts of voluntary eccleſiaſtical juriſdiction, wherein the king has a power to concur with the ordinary.

And in many caſes, to do what the ordinary canNOT do; as in conſtituting appropriations, uniting of churches, erecting eccleſiaſtical benefices or dignities, diſpenſing with irregularities, exempting from eccleſiaſtical juriſdiction, with relation to his free chapels; in pardoning crimes relating to eccleſiaſtical juriſdiction, and the execution of their ſentences; WHEREIN A PRIVATE INTEREST IS NOT CONCERNED; in ſuſpending the effects of their ſentences

(even)

(even) in cauſes criminal; and an infinite more of the like nature.

This is a large field, full of many titles, and of various learning.

As to eccleſiaſtical CONTENTIOUS juriſdiction: it is true, the king meddles not with it as to the exerciſe thereof; for that would be both an injury to the excellency of his majeſty, and alſo a wrong to the ſubjects in depriving them of their right of appeal, if there be cauſe for the ſame; for if the king ſhould be the judge upon the FIRST inſtance, the party cannot afterwards appeal.

And therefore in caſes of eccleſiaſtical CONTENTIOUS juriſdiction, his power is exerciſed by way of INTERPOSITION, in three inſtances, viz.

By his power of committing { Juriſdictionem ordinariam, et Juriſdictionem delegatam,

To commiſſioners of his own nomination under the great ſeal.

By ſuſpending their proceedings; which is done, not by his immediate authority, but by the adminiſtration of his temporal courts, who, by a power derived from the king, ſuſpend their proceedings BY PROHIBITION,—if there be cauſe.

By the laſt devolution of appeal; wherein, though the king himſelf does not judge IN PERSON, yet he appoints commiſſioners under the great ſeal to receive and determine the appeal.

And thus much of the king's eccleſiaſtical juriſdiction.

Now as to the TEMPORAL or CIVIL juriſdiction of the king: this, as well as his eccleſiaſtical juriſdiction, is of two kinds, viz.

Voluntary.

Contentious.

His voluntary TEMPORAL juriſdiction conſiſts,

In

In erecting of courts by his great ſeal; ſo that they be courts of the common law; for a court of equity cannot be now erected, but by act of parliament.

In the erection and collation of,
Juriſdictions.
Regalities.
Liberties.
Franchiſes.
Exemptions.
Privileges: and,
Dignities.

In erecting and collating of juriſdictions, viz.
Exempt juriſdictions.
Non-exempt juriſdictions.

Exempt juriſdictions; as the juriſdiction of counties palatine, juriſdiction not to be impleaded extra muros, conuſance of pleas, &c.

Non-exempt juriſdictions; as leets, torns, power to hold pleas, &c.

In the collation of regal powers; as of coining money, pardoning offenders, conſtituting juſtices, &c.

But ſee how far theſe are reſumed by ſtat. 28 Hen. VIII.

In the collation of liberties; as foreſts, parks, chaſes, warrens, ferries, gaols, return of writs, ports of the ſea, fairs, markets, tolls, and many others of like nature.

In the collation of franchiſes; as creating of free boroughs, giving power of ſending burgeſſes to parliament, creating and dividing counties, erecting of corporations.

In exemptions of all kinds; as from ſuit at the county, torn, or hundred court; alſo from ſerving on juries, and from paying tolls, cuſtoms, ſubſidies, &c.

In the collation of privileges; as endenization of aliens, privileges againſt arreſts and impriſon-

priſonment, and enfranchiſing villeins by his preſence formerly.

In the creation and collation of dignities; as dukes, marquiſſes, earls, viſcounts, barons, &c.

And thus far of the king's temporal voluntary juriſdiction.

As to the king's temporal CONTENTIOUS juriſdiction before mentioned, this is not exerciſed by the king in his own proper perſon, for the reaſons before given in the head of eccleſiaſtical contentious juriſdiction; for though inſtances have been of the king of England ſitting in the court of king's bench, and though the ſtile of that court is coram rege, and the chief juſtices there were anciently called locum tenentes domini regis, yet, when the king ſat there in perſon, the judgment or opinion of the court was always given by the juſtices.

The king always exerciſes this contentious temporal juriſdiction by his judges or juſtices, which he creates or conſtitutes four ways:

By WRIT, as the chief juſtice of the king's bench.

By PATENT, as the ordinary judges of the eſtabliſhed courts at Weſtminſter.

By COMMISSION, as juſtices of oyer and terminer, gaol-delivery, aſſize, and niſi prius. Vide infra.

By CHARTER as the judges in courts of corporations and inferior courts. (*b*)

(*b*) To maintain both the dignity and independence of the judges in the ſuperior courts, it is enacted by the ſtatute 13 W. III. c. 2. that their commiſſions ſhall be made (not, as formerly, and in the time of ſir Matthew Hale, DURANTE BENE PLACITO, but) QUAMDIU BENE SE GESSERINT, and their ſalaries aſcertained and eſtabliſhed. But ſee 1 Geo. III. c. 23. and Blac. Com. 1 v. oct. 267.

SECT. VII.

Concerning the cenſus regalis; *or, the king's* royal revenue. (*c*)

I Come now to ſpeak of the CENSUS REGALIS, or the king's royal revenue; and here I ſhall not ſay much of his houſes, manors, lands, fee-farms, or free rents, becauſe theſe are common to him with other perſons; but I ſhall only ſpeak of his royal revenue, or CENSUALES PRÆROGATIVÆ, and that CENSUS REGALIS, of which the law takes notice as of common right belonging to him, AS HE IS KING.

And the kinds of thoſe revenues are two, viz.
Eccleſiaſtical.
Temporal.

His eccleſiaſtical revenues are of two kinds:
Extraordinary.
Ordinary.

His extraordinary revenues ECCLESIASTICAL are thoſe ſubſidies and tenths, and other eccleſiaſtical ſupplies granted occaſionally by the clergy in their ſeveral convocations.

Note; in thoſe OCCASIONAL ſupplies the law takes notice, that the king has an inheritance, though depending upon the bounty of his ſubjects, and therefore he may grant an exemption from them; as likewiſe he may do to particular perſons from temporal ſubſidies, hereafter mentioned, for the ſame reaſon.

His ordinary revenues ECCLESIASTICAL are likewiſe of two kinds:
Conſtant, or annual.
Contingent, or caſual.

(*c*) As to the royal revenue, upon the footing on which it AT PRESENT ſtands, ſee the eighth chapter of the firſt book of Mr. Juſtice Blackſtone's Commentaries.

The

The conſtant or annual revenue eccleſiaſtical, is his tenths of eccleſiaſtical benefices, extraparochial tithes, and ſome other things of eccleſiaſtical nature, that poſſibly might come to him by the diſſolution of monaſteries.

Hither may be referred proxies, (procurations,) penſions, tithes, appropriations, &c.

The caſual, or uncertain, eccleſiaſtical revenues, are,

His firſt fruits of all the eccleſiaſtical benefices; ſettled in him by ſtat. 26 Hen. VIII.

The temporalities of biſhops; which though they are in the crown by reaſon of the king's right of patronage, yet I may call them SPIRITUAL, becauſe they are part of the revenues of an eccleſiaſtical corporation: and on the ſame reaſon,

Corrodies alſo; as being of the foundation of eccleſiaſtical corporations.

And alſo lapſe itſelf; which though it be not reckoned a revenue, becauſe not to be ſold, yet it is EQUIVALENT to a revenue; for it yields a preferment for his clerk.

SECT. VIII.

Of the king's temporal revenue.

I Come now to that part of the king's cenſus regalis which I call TEMPORAL: and this is likewiſe of two kinds;

Extraordinary.

Ordinary.

The extraordinary TEMPORAL revenue may be further divided into,

The ancient.

The modern.

Ruſhw. Col. vol. 1. p. 481.

The ancient temporal extraordinary revenues are of ſeveral kinds, as,

Hidage, cornage, ſcutage.

Aids: ad corpus redimendum, ad filium primogenitum militem faciendum, ad filiam primogenitam maritandam.

The modern, are the ſubſidies and ſupplies granted by parliaments.

The ordinary cenſus regalis TEMPORALIS is alſo of two kinds, viz.

Common.

Special.

The COMMON cenſus regalis temporalis is either, certain, or caſual.

Certain; as his rents and demeſns, which are either,

Newly acquired by diſſolution, ſurrender, exchange: or,

Ancient; as, antiqua dominia coronæ, i. e. ancient demeſns.

Here inſert what they were, what the tenants privileges were, &c.

The CASUAL ordinary temporal revenues; as, Profits of his tenures, and the like.

The SPECIAL ORDINARY cenſus regalis, in its original was annexed to the crown for the ſupport of the kingly ſtate and dignity; this is of ſeveral kinds, viz.

Purveyance, or buying at the king's price; which is ſince taken away. (*d*)

Priſage, i. e. one tun of wine for every ten tuns laden in every ſhip; and from aliens, in lieu thereof, two ſhillings for every tun.

Here add who are exempted from priſage, &c.

Cuſtoms, great and ſmall, magna & antiqua cuſtuma.

Bona vacantia, as waifs, ſtrays, wreccum maris.

Royal fiſh, as whale and ſturgeon.

(*d*) Vide 12 Car. II. c. 24.

Bona

Bona forisfacta, vel confiſcata; as,
Bona felonum, vel felonum de ſe.
Bona fugitivorum.
Bona utlagatorum, & in exigendis poſitorum.
Royal eſcheat; as
Terræ Normannorum.
Terræ Alienigenorum.
Terræ Proditorum.
2 Inſt. p. 576, 577.
Royal mines.
Maritime increaſe, by reaſon of Illuvio Maris.
Profits of his courts; as,
His fees of the ſeal.
Fines upon original writs.
Poſt-fines, or fines pro licentia concordandi.
Fines for miſdemeanors, and thoſe are either common or royal.
Common fines on vills, townſhips, or hundreds, for the eſcape of murderers, felons, and the like.
Amerciaments. Vide § 1.
Cuſtody of ideots and lunaticks lands:
The latter upon account, not ſo the former.
Profits of his foreſts.
Treaſure trove.

SECT. IX.

Of the relative prerogatives of the crown.

THUS far have I gone with the direct or ſubſtantive prerogatives of the crown; now I come to thoſe that are dependant and relative; which are of ſeveral kinds, viz.

The prerogatives,

Of his PRESENCE, in relation to breach of the peace, ſeiſure of villeins, arreſts, &c.

Of his POSSESSIONS;—that no man can enter upon him, but is driven to his ſuit by petition. And here of traverſe, monſtrans de droit, amoveas manus, &c. when, in what caſes, and how to be brought.

Of his DEMESNS; the rights and exemptions of ancient demeſn. Vide ſupra, ſ. 8.

Of his grants, how to be expounded.

Or his ſuits; as,

In what courts, and election of courts.

In what writs.

In his proceſs.

In his pleadings.

In his judgments.

In his executions.

Of his DEBTORS AND ACCOUNTANTS, in their debts and accounts.

In relation to his TREASURE, and of his officers imployed therein.

In relation to perſons RELATED to him; as,

His queen conſort; and here of her ſeparate capacity, her revenue, aurum reginæ.

His children; his eldeſt ſon, eldeſt daughter, &c.

His miniſters attending his perſon, or his courts, or his public ſervice.

And herein,

Of privilege.

Of protection.

And thus I have gone through the analyſis, or ſcheme of the king's prerogative; by which, tho' it be but haſtily and imperfectly done, may be ſeen, of what vaſt dimenſion this one, though GREAT title, of the law is, and what a vaſt number of great and conſiderable titles fall into it; inſomuch, that if I ſhould purſue any one of theſe ſubordinate titles, though it might ſeem but narrow, and here expreſſed but by a word or two, as wreck, waif, toll, cuſtom, &c. there is not one of theſe, but in the bare analyſis of it, and of the ſeveral incidents and rivulets that would be found

to fall into it, would grow as large as the brief abſtract of this great head has done, and it may be much larger; as the capillary veins and arteries in the body take up more room and extenſion than the great trunks, out of which their ſmall ramifications are drawn.

SECT. X.

Of the SUBORDINATE *magiſtrates: and firſt of eccleſiaſtical.*

THUS far of the ſupream magiſtrate; and of the rights annexed to him by reaſon of his office. The next conſideration is of SUBORDINATE magiſtrates, which I ſhall conſider in the ſame method as the former, viz. not only in their own perſons, but alſo in thoſe rights they have annexed to them by reaſon of their offices or magiſtracy.

All ſubordinate magiſtracy is derived from the ſupream, either immediately or mediately; either by expreſs grant from him, or by ſomething that implies or ſuppoſes it in its original; viz. cuſtom or preſcription. And this magiſtracy may be diſtinguiſhed into theſe kinds, viz.

Magiſtrates eccleſiaſtical.
Magiſtrates temporal.

Eccleſiaſtical magiſtrates; ſuch namely as have a juriſdiction annexed, are of two kinds;

Ordinary.
Extraordinary.

The ordinary eccleſiaſtical magiſtrates are alſo of two kinds, viz.

Such as have eccleſiaſtical juriſdiction annexed to their places and offices PRIMARILY and originally; as archbiſhops, biſhops, archdeacons.

Such as have their juriſdiction by ſubſtitution and delegation from THEM, as chancellors, officials, ſurrogates, vicars general, guardians of the ſpiritualities, &c.

The extraordinary eccleſiaſtical magiſtrates, are certain perſons appointed by the king's commiſſion, for hearing and determining matters of eccleſiaſtical conuzance; the king being ſupream head in matters eccleſiaſtical. And this is either,

In the firſt inſtance, ſuch as were anciently commiſſioners in matters eccleſiaſtical, either ad univerſalitatem cauſarum, or in particular caſes.

In the ſecond inſtance, as commiſſions of appeal, and of review.

And becauſe thoſe magiſtrates have eccleſiaſtical juriſdicton annexed, here might be brought in the whole particulars thereof, and amongſt them principally theſe, viz.

In matters of crime, as adultery, fornication, inceſt, &c.

In matters of intereſt, as,

De teſtamentis & adminiſtrationum commiſſione. Here of that matter.

De matrimonio & divortio: and here, who may marry, what is a lawful marriage; the kinds of divorces, and their conſequences or effects;

In diſſolving, or not.

In baſtardizing, or not.

In caſes of general baſtardy, when written to by the TEMPORAL courts.

In caſes of tithes.

In caſes of dilapidations.

In caſes of ability of clerks, inſtitution, deſtitution or deprivation, ſuſpenſion, ſequeſtration, &c. of eccleſiaſtical benefices.

Of the difference between juriſdiction VOLUNTARY, as admiſſions, inſtitutions, probate

of

of wills, commiſſion of adminiſtrations, and CONTENTIOUS juriſdiction.

Of their ſentences and coertion, namely excommunication, and the effects thereof, in reference to,

Diſabling the party.

Impriſoning the party.

The method of RESTRAINING the exceeding of their juriſdiction;

By prohibitions.

By præmunire.

The means of redreſſing their errors,

By appeal: the method and effects thereof.

Of the ſeveral courts belonging to their ſeveral juriſdictions; as,

To archbiſhops, their court of audience, prerogative court, and court of arches.

To biſhops, their ſeveral conſiſtories, and chanceries, their chancellors, &c.

Their power of viſitation. To what it extends:

To corporations { Spiritual. / Lay;

When to hoſpitals.

When to univerſities, &c.

SECT. XI.

Concerning TEMPORAL *magiſtrates.*

THE temporal magiſtrates are of three kinds, viz.

Military.

Maritime.

Civil, or common law magiſtrates.

The military, were the conſtable and marſhal, whoſe power, as far as the common law takes notice of it, conſiſted of two parts, *viz.*

Of

Of a kind of MIXTUM IMPERIUM, which principally was for the preſervation of peace, and ordering the army in time of war.

A juriſdiction belonging to their court martial: whereof before.

The maritime, is the admiral, and thoſe deriving power under him. Their power likewiſe conſiſts of,

A kind of MIXTUM & SUBORDINATUM IMPERIUM over the officers and ſeamen, eſpecially in the king's fleets and yards.

POTESTATEM JURISDICTIONIS, in relation to matters ariſing upon the high ſea.

And here of the admiral's juriſdiction, and the remedy, if he exceeds in it;

By prohibition.

Action on the ſtat. 2 H. 4.

The common law, or civil magiſtrate; I mean ſuch as are inſtituted either by the common law, by ſtatute, or by cuſtom: theſe, in relation to things temporal, are various.

And becauſe theſe magiſtrates conſiſt not only of natural perſons, as they are ſuch, but of natural perſons conſtituted in ſome degree of empire, power, or juriſdiction; here will aptly fall in the diverſity, the juriſdiction and powers of the ſeveral courts, and of the officers, both miniſterial and judicial. Theſe, though I ſhall not proſecute in all their branches and extents, yet I ſhall give ſome ſhort account of them, viz.

The ſubordinate CIVIL magiſtrates are of two kinds:

Such as have not only a civil power, which I may call POTESTATEM MIXTI IMPERII, but alſo have a power of juriſdiction.

Such as have a kind of civil power, or MIXTUM IMPERIUM, but without juriſdiction. Vide ſect. 12.

As to the former,

The

The perſons that exerciſe this power or juriſdiction, are called JUDGES, or judicial officers.

The places, or tribunals, wherein they exerciſe their power, are called COURTS.

And the right by which they exerciſe that power, is called JURISDICTION.

This therefore yields us theſe conſiderations.

The courts themſelves, what they are, how they are conſtituted.

What their juriſdiction is, and the extent thereof.

Who the judges are, and how made, whether by commiſſion, charter, preſcription, cuſtom, or by courſe of the common law.

The courts are of two kinds;

Courts of record.

Not of record.

Firſt, of courts of record, there is this diverſity, viz.

Supream.

Superior.

Inferior.

The ſupream court of this kingdom is the HIGH COURT OF PARLIAMENT, conſiſting of the king, and both houſes of parliament.

The courts I call SUPERIOR, are indeed of ſeveral ranks and degrees, and every one nevertheleſs is to keep within the bounds and confines of its juriſdiction by law aſſigned. And they are,

More principal.

Leſs principal.

The more principal are,

The courts of the lords houſe in parliament;

The great courts at Weſtminſter; as, { Chancery, King's-bench, Common Pleas, Exchequer.

Juſtices

Juſtices itinerant, (e) { Ad communia placita,
Ad placita foreſtæ.

The LESS principal, are ſuch as are held,

By commiſſion. { Gaol-delivery,
Oyer and terminer,
Aſſize,
Niſi prius,
And divers others.

By cuſtom, or charter: { As the courts of the counties palatine of { Lancaſter, Cheſter, Durham.

By virtue of act of parliament, and the king's commiſſion: as the courts of { Grand ſeſſions, Sewers, Juſtices of peace, And divers others.

INFERIOR courts of record. Though there be a ſubordination of moſt courts to ſome other, yet for diſtinction's ſake I ſhall call thoſe inferior courts which are ordinarily ſo called; as,

Corporation courts.
Courts Leet.
Sheriffs torns.

Secondly, courts NOT of record are divers: as, { Courts baron, County courts, Hundred courts, And others.

But I am not ſolicitous of purſuing this matter of courts and their juriſdiction over-largely; becauſe all the learning of them is already put together in the Tractates of Crompton, lord Coke, and others, who have written on the juriſdiction of courts.

(e) See Blac. Com. 3 v. 57. 4 v. 411, 422.

SECT.

SECT. XII.

Of inferior magiſtrates, SINE JURISDICTIONE.

IT now follows, that ſomewhat be ſaid of thoſe magiſtrates who have a certain IMPERIUM, but without juriſdiction; and theſe are called miniſterial officers.

Some officers indeed are ſimply MINISTERIAL, as clerks and officers in courts, cuſtos brevium, prothonotaries, the remembrancers and chamberlains of the exchequer, &c.

But theſe, though they have a ſuperintendency over their ſubordinate miniſters, and a miniſterial adminiſtration in courts of juſtice and elſewhere, I ſhall not meddle with in this place, but refer them to the ſeveral courts to which they belong.

For thoſe that I here intend are of a more public and common kind, and are principally theſe, viz.

The ſheriff of the county, who is THE GREATEST MINISTERIAL OFFICER; and I call him a magiſtrate, becauſe he is A CONSERVATOR OF THE PEACE of the county, and executes the proceſs of the king's courts.

Here are conſiderable,
How conſtituted:
How diſcharged:
What his power, his office, his duty.
This is a large ſubject: ſee thoſe that have written of this office.

Mayors of corporations. And here of heads and governors of colleges, &c. (*f*)

Conſtables, and head conſtables.

Theſe, though they have not any juriſdiction to hold conuzance of any fact, yet are conſervators

(*f*) As to JUSTICES of the peace, ſee Blac. Com. 1 v. 350 to 355.

vators of the peace, and have a kind of MIXTUM IMPERIUM relative to it.

Bailiffs of liberties, ſerjeants of the mace, and all that have a power veſted in them by law for the EXECUTION of juſtice, are within the precincts and extents of their ſeveral offices A KIND of magiſtrates; for a ſubjection is by law required of others to them, in relation to that power wherewith they are inveſted, and the execution thereof.

Thus far of magiſtrates both ſupream and ſubordinate, and the ſeveral rights that are INTUITU & SUB RATIONE OFFICII annexed to them.

SECT. XIII.

Of the rights of the people or ſubject.

HAVING gone through the diſtribution of magiſtrates, I come now to the other term of relation, namely, of SUBJECTS.

And the RIGHTS of ſubjects are of theſe two kinds, viz.

Rights of DUTY, to be performed.

Rights of PRIVILEGE, to be enjoyed.

As to the firſt of theſe, they are ſuch duties as are to be paid or performed by them; either,

To the king, as ſupream executive magiſtrate: or,

To inferior or ſubordinate magiſtrates.

The rights or duties to be performed by the people to the king himſelf, are,

Reverence and honour, fidelity and ſubjection.

All which come under the name of ALLEGIANCE; and the extent of this is declared, and aſſurance thereof given, by the oaths of allegiance, &c. of ſupremacy by 1 Eliz. of obedience by 3 Jac. 1.

Pay-

Payments of thoſe rights and dues, cuſtoms, ſubſidies, &c. which either by the common law, or by act of parliament, are ſettled on the king.

The rights to be performed to INFERIOR magiſtrates, are,

Reverence and reſpect to them, according to their place and authority.

A juſt ſubjection to their LAWFUL power and authority, as far as by law it extends.

The rights and liberties to be enjoyed BY THE PEOPLE, both in relation to the king, and all his ſubordinate magiſtrates, are,

That they be PROTECTED by them, and treated according to the laws of the kingdom, in relation to,

Their lives.

Their liberties.

Their eſtates.

And here falls in all the learning upon the ſtat. of magna charta, and charta de foreſta, which concerns THE LIBERTY OF THE SUBJECT; eſpecially magna charta, cap. 29. and thoſe other ſtatutes that relate to the impriſonment of the ſubject without due proceſs of law; as the learning of habeas corpus, and the returns thereupon;

Where the party is to be bailed.

Where to be remanded.

Where to be diſcharged.

Hither alſo refer thoſe laws that relate to taxes and impoſitions; as,

The ſtat. de tallagio non concedendo. 2 Inſt. 59.

The petition of right, &c. 3 Car. 1.

Alſo, the ſtatutes and laws concerning monopolies.

Commiſſions of martial law.

Commitments by the lords of the council.

And concerning the trial of mens lives, liberties, or eſtates; otherwiſe than according to the known laws of the land.

Theſe, and many more of this nature, are common heads of thoſe liberties and rights that the people are to enjoy under the magiſtrate.

And thus far concerning the CAPITA LEGIS, in reference to the political relation of the magiſtrate, both ſupream and ſubordinate of the one part, and the SUBDITI or ſubject on the other part: for though ſubject, in a more ſtrict and peculiar ſenſe, is THE CORRELATIVE OF THE PRINCE; yet in a more large and comprehenſive ſenſe, it is a correlative to any inferior magiſtrate alſo, according to a more limited and reſtrained ſubjection.

SECT. XIV.

Of the rights of perſons under relations oeconomical: and firſt, of huſband and wife.

THUS far of the rights of perſons under a political relation: now concerning the rights of perſons under a relation OECONOMICAL.

And they are theſe;

Huſband and wife.

Parent and child.

Maſter and ſervant.

And I ſhall here note once for all, that in oeconomical relations, as in the former, I ſhall not only take in the perſons themſelves, but alſo thoſe JURA RERUM which concern them under that relation; which though they may be of a diſtinct conſideration under jura rerum, yet in this, and what follows, I ſhall, as before I have done, take in thoſe jura rerum that have a kind of connexion with the JURA PERSONARUM, under their ſeveral relations.

In the conſideration of this relation of huſband and wife, are theſe things conſiderable, viz.

In relation to the perſons themſelves.

In

In relation to certain connexes, conſequences, or incidents, belonging to perſons under this relation.

As to the former, theſe CAPITA LEGIS and legal enquiries fall in, viz.

The perſons that by law may intermarry, the limits whereof are preſcribed by the ſtatute 31 H. 8. reſtraining it to the degrees prohibited by the levitical law.

And yet a marriage within thoſe degrees is NOT void, but voidABLE by ſentence of divorce.

The age of conſent to the marriage:
In the male, fourteen.
In the female, twelve.

Note, the effects of marriages INFRA ANNOS NUBILES. (g)

The differences of marriages; as,
A marriage de facto.
What is requiſite to the conſtitution thereof;
And what effect it has.
And a marriage de jure,
What it is, and the effects:
And how each may be tried.

What diſſolves the marriage.
And here of divorces, viz. Co. on Lit. 235. a.
A menſa & thoro only; as,
Cauſa adulterii.
Cauſa ſævitiæ.
A vinculo matrimonii; as,
Cauſa conſanguinitatis vel affinitatis.
Cauſa præcontractus.
Cauſa frigiditatis.

And here the effects of ſuch divorce,
In relation { to the parties themſelves. / to their children.

(g) As to CLANDESTINE marriages, ſee 26 Geo. II. c. 33. and Blac Com. 1 v. 439. 4 v. 162.—As to the marriage of lunatics, ſee 15 Geo. II. c. 30. And as to the marriages of the royal family, ſee Forteſc. Al. 401, 402. Lords' Journ. 28 Feb. 1772. and 12 Geo. III. c. 11.

The ſecond thing is, in relation to thoſe incidents and conſequences that ariſe upon the intermarriage, viz.

1 Rol. Abridg. 342.

What things the huſband acquires by the intermarriage, viz.
- Perſonal things in poſſeſſion.
- Real chattels to diſpoſe.

And here,
- What ſhall be a poſſeſſion.
- What a diſpoſition.

What things he acquires by the death of his wife;
- In relation to chattels real:
  - By ſurviving her. Vide ſect. 33.
- In relation to inheritances; as,
  - Tenant by the curteſy, if he have iſſue inheritable by her.

Bacon's Hiſt. 105.

Here of tenants by curteſy.

What things he acquires NOT by the intermarriage, or death.

Note, perſonal things in action, are in him to diſcharge by the marriage; but not to enjoy them by marriage; or death, unleſs he be her executor or adminiſtrator.

What acts of the huſband during the marriage bind the wife.
- And here of diſcontinuances.

What acts of the wife during coverture bind the huſband, and what not.
- And here of
  - Her contracts,
  - Her wills,
  - Her receipts.

What acts bind herſelf, and what not.
- And here of fines by judgment againſt her.

What the wife acquires by the marriage or death of the huſband;
- In relation to honorary titles and precedence:
- In relation to inheritances.
  - And here of dower, the kinds of it,

When

When and how due.
Alſo of quarantine.
In relation to chattels.
Here de rationabili parte bonorum;
And bona paraphernalia.
Remedies by the wife againſt the huſband,
In caſu ſævitiæ.
In caſu alimoniæ.
Either in the ſpiritual court:
Or temporal.
In what actions they muſt ſever.
In what they may join or ſever.
What relation of proximity either has to the other in caſe of ſurvivorſhip, as to the adminiſtration of each other's goods.

SECT. XV.

Concerning the relation of parent and child.

I Come now to the ſecond œconomical relation, i. e. father, or mother, and children; and therein we are to conſider,

The father's intereſt in the child:
In his cuſtody or wardſhip.
In the value of his marriage.
In his diſpoſal.
The father has the diſpoſal,
Of his child's education.
Of his cuſtody to another.
Vide the act, how far the mother, ſurviving the father, is intereſted in thoſe rights.
The child's intereſt in the father or mother, 1 Sid. 113.
To be maintained by him in caſe of impotency, by ſtat. 43 Eliz. c. 2.
The RECIPROCAL intereſt of each:
Whereby they may,

Maintain each other's ſuits.
Juſtify the defence of each other's perſons.

1 Sid. 114, 115. Here inquire how far forth the GRANDCHILD, after the death of the father, is a child within theſe conſiderations.

SECT. XVI.

Of the relation of maſter and ſervant.

TOUCHING the third œconomical relation, of maſter and ſervant, little is to be ſaid. But here conſider,

The kinds of ſervants.
The nature of retainers.
The acts that may be done RECIPROCALLY by the maſter, or ſervant, to each other;
In maintaining their ſuits;
In defending their perſons.

SECT. XVII.

Concerning relations civil.

I Have done with relations political, and alſo œconomical, and therefore come now to thoſe which I call CIVIL; though it is true, that term in a general acceptation, is alſo applicable to the two former relations.

But in a LIMITED and LEGAL ſenſe, I diſtinguiſh civil relations into four kinds, viz.

Anceſtor and heir.
Lord and tenant.
Guardian and pupil.
Lord and villein.

SECT.

SECT. XVIII.

Concerning anceſtor and heir.

THIS relation I made diſtinct from that of parent and child, becauſe many perſons are anceſtors, as to the tranſmiſſion of hereditary ſucceſſions, that are not parents; and many inherit as heirs that are not children to thoſe from whom they inherit. And although the buſineſs of hereditary ſucceſſions will fall in hereafter, when we come to ſpeak of the JURA RERUM, and the manner of transferring of properties, yet I ſhall mention it here alſo. And firſt, conſider,

Who cannot be anceſtor or heir.

A baſtard MAY be ANCESTOR in relation to his own children, or their deſcendants, but not to any elſe.

But a baſtard cannot be HEIR.

Add here, of baſtards;

Who a baſtard by the laws of England;

By what name he may take: by purchaſe, &c.

In a right ASCENDING line, the ſon is NOT an anceſtor TO TRANSMIT to his father, or grandfather, by hereditary ſucceſſion.

The HALF-blood is an impediment of deſcent, viz.

Of lands;

Not of dignities.

Who may be anceſtor or heir. Inf. Sect. 30, 33.

And here all the rules of hereditary ſucceſſions may come in: whether,

IN LINEA DESCENDENTE, from father to ſon, or nephew;

IN LINEA ASCENDENTE, from nephew to uncle:

IN LINEA TRANSVERSALI, from brother to brother.

SECT. XIX.

Concerning lord and tenant.

UNDER the relation between lord and tenant, theſe titles fall, viz.

Firſt, the tenure itſelf:

What it is;

How created:

What the fruits thereof,

Rent, { Service. / Charge. / Seck. } Inf. Sect. 24.

Services of two kinds:

Of common right incident to tenures; as,

Fealty:

What it is.

Conventional ſervices; as,

Homage,

Knights ſervice,

Grand or petit ſerjeanty.

Secondly, certain perquiſites ariſing from it; as,

Wardſhip;

Marriage;

Eſcuage;

Relief:

And alſo eſcheat, which is either,

Ex DEFECTU SANGUINIS, for want of heirs: or, Poſtea, Sect. 33.

Ex DELICTO TENENTIS, as by attainder.

And theſe ſeveral titles may be branched into exceeding many particulars.

SECT.

SECT. XX.

Concerning guardian and pupil.

THE third ſort of civil relations are pupil and guardian. And herein are conſiderable,
With reſpect to the guardian, what and how many ſorts of CUSTODIES there are: as, 3 Co. 37. b
Guardian BY NATURE,—the father;
And in ſome reſpects, { The mother. / The grandfather.
Quære, in what caſes, and to what intents.
Guardian BY NURTURE.
Guardian BY SOCAGE:
Who ſhall be;
For how long time.
Guardian by knights ſervice.
Vide ſect. prox' ſupra.
With reſpect to the pupil or heir, is conſiderable;
When he ſhall be ſaid of FULL age
By common law:
By cuſtom.
What he is enabled or diſabled to do:
In relation to lands.
In relation to goods or contracts.
And here,
Where he ſhall be bound;
Where not.
Theſe may come in here, but more properly before, under capacity, ſect. 1.

SECT. XXI.

Of lord and villein.

THIS title is at this day of LITTLE uſe, and in effect is altogether antiquated; and therefore I refer myſelf herein wholly to Littleton.

SECT. XXII.

Concerning perſons or bodies politic, i. e. CORPORATIONS.

I HAVE done with the JURA PERSONARUM NATURALIUM, conſidered under their ſeveral relations, political, œconomical, and civil; and therefore I now come to perſons politic, or corporations, that is, bodies created by OPERATION OF LAW.

The higheſt and nobleſt body politic, is THE KING; who though he be a body natural, yet to many purpoſes is alſo a body politic or corporate, as has been already ſhewn, and ſhall not now reſume. Therefore bodies corporate, in reſpect of the nature of them, I divide into two kinds, viz.

Eccleſiaſtical.
Temporal.

Eccleſiaſtical corporations are diſtinguiſhed in their conſtitution, thus; viz.

In the title of it.
In the manner of it.
In the nature of it.

In the TITLE of their conſtitution, they are,
By preſcription;
By charter: as all NEW eccleſiaſtical corporations, founded WITHIN memory, are.

In the MANNER of their conſtitution, they are,
Elective.
Preſentative.
Donative.

And here,
Of inſtitution.
Induction.

By whom to be made;
And when;
And the effects thereof.
Alſo of lapſe,
And devolution;

When,

When, and how.

In the NATURE of their conſtitution, they undergo many diverſifications, and are,

With cure, as parſon, vicar, &c.

Without cure, as prebend.

Regular, as abbot, prior.

Secular, as maſter of hoſpital, parſon, vicar, &c.

With dignity, as biſhops, deans, chancellors; or,

Without dignity, or ſimple benefices, as parſon, vicar, prebend.

Sole, as biſhop, dean, parſon, vicar, prebend; or,

Aggregate, as dean and chapter, maſter and confraternity.

And under every of theſe diſtinctions, the following connexes fall in, and are conſiderable, viz.

How they may ACQUIRE;

And what is requiſite thereto.

By charter or deed.

By licence to purchaſe in mortmain.

And here of MORTMAIN, which is equally applicable to all ſorts of corporations, whether eccleſiaſtical or ſecular.

How they may ALIEN.

Here fall in the ſeveral diſabling ſtatutes of 1ſt, 13th, and 18th of Eliz. and the enabling ſtatute 32 H. 8. &c. and what circumſtances and qualifications are requiſite to enable ſuch alienations; and if by demiſe, or otherwiſe.

How they are DISSOLVED, and the effect of ſuch diſſolutions; as,

What becomes of

Their lands;

Their goods.

And this is likewiſe applicable to

Lay corporations.

Now as to temporal or lay corporations,

They are of two kinds;

SPE-

SPECIAL corporations, i. e. erected to ſome ſpecial purpoſes, as where the grant is to a monk, or to the good men of Iſlington in fee-farm.

So CHURCH-WARDENS are, by the common law, a ſpecial corporation to take goods or perſonal things to the uſe of the pariſh.

GENERAL corporations; which are diſtinguiſhed thus:

In reſpect of the TITLE of their corporation,

By charter:

By preſcription.

In reſpect of their QUALITY or condition, they are either,

SOLE, as the chamberlain of London, as to bonds taken by him for the uſe of orphans, is a ſole corporation.

AGGREGATE, as mayor and commonalty, maſter and ſcholar, maſter and confreres of an hoſpital, &c.

And here,

The manner of their viſitation:

And by whom.

In reſpect of the RULES of their conſtitution, where the members are,

Elective.

Donative.

And as common incidents to corporations are conſiderable,

How they are diſſolvable.

By QUO WARRANTO.

The effect of ſuch diſſolution.

How the particular members are removable.

Their remedy, if wrongfully removed,

By MANDAMUS.

And here comes in the learning of writs of reſtitution in the king's bench, of perſons unduly diſfranchiſed.

Hitherto

Hitherto of the diſtribution of the heads and branches of the law touching the jura perſonarum, or rights of perſons.

SECT. XXIII.

Concerning the JURA RERUM, *and the general diviſion thereof*

HAVING done with the rights of perſons, I now come to the rights of things. And though according to the uſual method of civilians, and our ancient common law tractates, this comes in the ſecond place after the jura perſonarum, and therefore I have herein purſued the ſame courſe, yet that muſt NOT be the method of a young ſtudent of the common law, but he muſt begin his ſtudy HERE,—at the JURA RERUM; for the former part contains matter proper for the ſtudy of one that is well acquainted with thoſe jura rerum.

And although the connexion of things to perſons has in the former part of theſe diſtributions given occaſion to mention many of thoſe jura rerum, as particularly annexed to the conſideration of perſons under their ſeveral relations; yet I muſt again reſume many of them, or at leaſt refer unto them; and this without any juſt blame of tautology; becauſe there they are conſidered only as INCIDENTAL and relatively; but HERE they are conſidered ABSOLUTELY—in their own nature or kind,—and with relation to themſelves, or their own nature,—and the ſeveral intereſts in them, and tranſactions of them.

And in this buſineſs I ſhall proceed in the method following, viz.

I ſhall conſider the THINGS themſelves, about which the jura rerum are converſant, and give their general diſtributions.

I ſhall conſider the ſeveral RIGHTS in thoſe things, or to them belonging; and the manner of the production, creation, and tranſlation of thoſe rights.

I ſhall conſider the wrongs, injuries, or cauſes of action, ariſing by wrongs or injuries DONE TO thoſe rights.

I ſhall conſider the ſeveral REMEDIES that relate either to the retaining or recovering of thoſe rights.

Firſt, therefore I proceed to the conſideration of the things themſelves, and their diſtributions. Bracton (and others) following the civil law, in his ſecond book, cap. 11. DE RERUM DIVISIONE, makes many diſtributions of things; but I ſhall only uſe ſuch a diſtribution, as may be comprehenſive enough to take in the general kinds of things, whereof the law of England takes notice; without confining myſelf to the diſtributions of others, but where I find it neceſſary for my purpoſe.

Things therefore in general may be thus diſtributed, viz.

Some things are temporal or lay.

Some things are eccleſiaſtical or ſpiritual.

Thoſe things that are temporal or lay, are of two kinds;

Some are JURIS PUBLICI.

Some are JURIS PRIVATI.

Thoſe things that are JURIS PUBLICI, are ſuch as, at leaſt in their own uſe, are COMMON TO ALL the king's ſubjects; and are of theſe kinds, viz.

Common highways.

Common bridges.

Common rivers.

Common ports, or places for arrival of ſhips.

And this lets in the various learning touching thoſe things. As for inſtance:

Who are to repair highways or bridges.

By tenure.

By cuſtom, or of common right.
Alſo concerning nuſances in them.
And in common rivers or ports.
And how to be remedied.
[But this we ſhall meet with when we come to pleas of the crown.]

Thoſe things that are JURIS PRIVATI, are of two kinds:
Things perſonal.
Things real.

Things perſonal are again of two kinds:
Things in POSSESSION.
Things in ACTION.

Things perſonal in poſſeſſion; as,
Money, jewels, plate, houſhold-ſtuff, cattle of all ſorts, emblements, &c.

Things in action, are RIGHTS of perſonal things, which nevertheleſs are NOT in poſſeſſion; as,
Debts DUE, either,
By contract;
By ſpecialty; as,
By deed or obligation, or
By recognizance.
Goods, whereof the party is DEVESTED, or out of poſſeſſion.
RIGHTS of damages UNCERTAIN; as,
Covenants broken.
Legacies not paid or delivered.
Perſonal things in CONTINGENCY; as,
Accounts, and many more.
Alſo annuities which are partly in poſſeſſion, for that they are grantable over; and partly in action, becauſe not recoverable but by action.

SECT.

SECT. XXIV.

Concerning things REAL, *and their diſtribution.*

THINGS real are of two kinds:
Corporeal,
Incorporeal.

Corporeal things real are ſuch as are MANURABLE. (*b*)

And they again are of two kinds;
SIMPLE.
AGGREGATE.

Things corporeal which are ſimple, are generally comprehended under the name of LANDS; which yet are diſtributed into ſeveral kinds, according to their ſeveral qualifications, and accordingly are demandable IN WRITS; as,

A meſſuage, a cottage, a mill, a toft, a garden, an orchard, arable land, meadow, paſture, wood, marſh, moor, furze and heath, and divers other appellations.

And here the learning comes in touching the NAMES of things, by which they either,
PASS in aſſurances; or,
ARE DEMANDABLE by writs, &c.

Things corporeal aggregate, are ſuch as conſiſt of things of SEVERAL NATURES, whether they be all corporeal, or the principal part corporeal, but the other part INcorporeal; becauſe that part which is corporeal in them, gives it the denomination of corporeal; and they paſs WITHOUT deed for the moſt part, as things corporeal do, and are of ſeveral kinds, viz.

Honours, conſiſting of many manors.
Manors, conſiſting of,
Things corporeal, as demeſns;

(*b*) By this adjective, Hale ſhould ſeem to mean, ſuch THINGS as are capable of cultivation. Vide Hale's Origin of Mankind.

Things

Things incorporeal, as reverſions, ſervices.
And here of manors, how created:
And the incidents to them; as,
Court-baron.
Alſo of the diſtribution of them into,
Manors IN RIGHT, where there are demeſns and freeholders.
Manors IN REPUTATION; as conventionary or cuſtomary manors, conſiſting of copyholders only.
Rectories, conſiſting of glebe and tithes.
And although rectories PRESENTATIVE may ſeem more properly to come under things eccleſiaſtical; yet ſince at this day many rectories and tithes are alſo become LAY fees, I bring them in under this diſtribution.
Vills, hamlets, granges, farms, &c. are a kind of corporeal things aggregate; for they conſiſt of houſes, lands, meadows, paſtures, woods, &c.
And here comes in,
Parcel, or nient parcel.
What parcel in right.
What parcel in reputation.
And the effects thereof in point of conveyance.
All the learning of incidents, appendants, appurtenances, &c. as,
What may be appendant, appurtenant, regardant.
How and where they paſs by GENERAL words, without naming them.

Things incorporeal are of A LARGE EXTENT, but may be reducible unto theſe two general kinds, viz.

Things incorporeal, NOT IN THEIR OWN NATURE, but ſo called in reſpect of the degree or circumſtance wherein they ſtand; as,
Reverſions.

Remain-

Remainders.
The eſtate of lands.
Here of reverſions and remainders; what they are, how transferred.
By deed.
By livery without deed.
Alſo how a reverſion may paſs by the name of lands, or by the name of a remainder, or e converſo.
Things incorporeal IN THEIR OWN NATURE: and theſe are of very great variety, and hardly reducible into general diſtributions, and therefore I am forced to take them by tale, viz.
RENTS reſerved, or granted; as rent-ſervice, rent-charge, rent-ſeck.
And here of rents; the ſeveral kinds of them; how created, how transferred, viz. by deed. How apportioned, how extinguiſhed; what the ordinary remedy to recover it, viz. DISTRESS.
But of diſtreſſes, ſee hereafter in remedies.
Services PERSONAL incident to tenures; as, homage fealty, and knights ſervice; what ſervices are entire, what ſeverable.
ADVOWSONS of all ſorts;
Donative:
Preſentative.
And here of right of patronage, right of founderſhip; how raiſed; how transferred; what incidents to it.
TITHES of all ſorts,
Perſonal;
Prædial:
And mix'd.
And here again of tithes, their kinds, their diſcharges, &c. may be referred hither, and that more properly than before.
COMMONS of all ſorts; as common of eſtovers, and of paſture, appendant and appurtenant; for cattle certain, and for cattle

cattle SANS number, ſeparabilis paſtura; and what may be done by thoſe commoners,

In relation to OTHER commoners by ADMEASUREMENT.

In relation to the lord by diſtreſs or action.

And all the learning hereof may be added here, though we ſhall meet with it again hereafter.

All kinds of PROFICUA CAPIENDA IN ALIENO SOLO; as herbage, pawnage, &c.

All kinds of penſions, proxies, (procurations) &c.

OFFICES of all ſorts.

And here of offices, their diſtribution, what may be incident or appurtenant to them.

FRANCHISES and LIBERTIES of all ſorts, many of which have been before mentioned, and may be transferred hither.

And here I ſhall again ſhortly diſtribute them into theſe two kinds, viz.

Such as are flowers of the crown, and part of the king's royal revenue, as waifs, ſtrays, felons goods, goods of perſons outlawed, priſage, wreck, treaſure trove, royal fiſh, royal forfeitures, fines, iſſues, amerciaments, foreſts, &c. Vide § 8.

Such as are NOT parcel of the king's royal revenue, but either lodged in him, or created by him; as counties palatine, markets, fairs, tolls, courts leet, hundred courts, liberty to hold pleas, returns of writs, bailiwicks of liberties, warrens, ferries, and the like.

And every one of theſe yield a large field of learning, viz.

How they may be created or acquired.

What are acquired by preſcription or cuſtom.

What in point of charter.

Where one liberty may be granted to the prejudice of another, or not.

How theſe ſeveral liberties are to be USED; what their nature, &c.

How they may be loſt, either by nonuſer, miſurer, or nonclaim in eyre.

And therefore, though I have mentioned theſe liberties and franchiſes before, in relation to the king's VOLUNTARY JURISDICTION in creating them, yet the full diſcuſſion and learning of every of them may be hither referred.

VILLEINS: and here that learning may come in. Vide ante, ſect. 21.

DIGNITIES; as dukes, marqueſſes, earls, viſcounts, barons, &c.

And thus far touching incorporeal real things TEMPORAL.

Their common incident is, that they paſs NOT from one to another WITHOUT deed. And to theſe ſeveral titles, may be reduced all the learning of each particular.

SECT. XXV.

Concerning things eccleſiaſtical or ſpiritual.

I HAVE done with things temporal, and come to thoſe that are ECCLESIASTICAL or ſpiritual. And though the poſſeſſions of eccleſiaſtical perſons, the offices, courts, and juriſdictions eccleſiaſtical, and tithes alſo, might come in under this general head, yet becauſe theſe things fall in the former title under temporal things, and for that the rule for them both is the ſame, I ſhall not need to repeat it here; only I will remove what before came under the title corporations, becauſe it may be thought to come in more conveniently in this place.

Ec-

Eccleſiaſtical things are of two kinds, viz.
Such as are eccleſiaſtical or ſpiritual in their USE.
Such as are ſo in their NATURE.
Of the former ſort, are,
Churches,
Chapels,
Church-yards, &c.
(Which lets in the learning touching repairs.)
And theſe are of two kinds.
Parochial.
And here falls in,
The bounds of pariſhes;
Relief of the poor;
And other parochial charges.
And theſe are either,
In right.
In repreſentation.
Not parochial; as,
Chapels of EASE.
Such as are eccleſiaſtical in their NATURE, are either,
Dignities, or,
Benefices.
Eccleſiaſtical DIGNITIES are of two kinds, viz.
SUPERIOR; as,
Archbiſhopricks,
Biſhopricks.
INFERIOR; as dignities in cathedral churches; as,
Dean,
Chancellor,
Præcentor.
Eccleſiaſtical benefices are likewiſe of two kinds:
WITH CURE; as,
Parſonages,
Vicarages, &c.
WITHOUT CURE; as,
Prebends,
Eccleſiaſtical hoſpitals, &c.

And here the learning touching thoſe matters, and alſo touching vacancy by pluralities.

Alſo of appropriations, common diſpenſations, qualifications:

And vacancy, by
Reſignation,
Deprivation,
Ceſſion.

So much touching eccleſiaſtical benefices not obſervable ſupra, ſect. 22.

SECT. XXVI.

Of the nature and kinds of PROPERTIES.

HItherto of the kinds of things; I come now to conſider the nature and kinds of thoſe PROPERTIES or INTERESTS that perſons have, or may have in them.

The rights of things are diſtributed according to the nature of the things themſelves; which are,

Perſonal.
Real.

The RIGHT of things perſonal is called PROPRIETY, and under that will come theſe conſiderables, viz.

The KINDS of thoſe rights;
The CAPACITIES wherein they are held:
The MANNER of their being acquired or transferred.

The kinds of thoſe rights or proprieties of things are three, viz.

A propriety of ACTION, which is relative to all things IN ACTION.
A propriety in POSSESSION.
A MIXED propriety, partly in action, and partly in poſſeſſion.

Touch-

Touching the property of things in action.

This is an INTEREST by SUIT or order of law, TO DEMAND the things themſelves, or damages for them.

But of this hereafter, when we come to wrongs or injuries.

Touching property in poſſeſſion, it is either,
Simple or abſolute;
Special or particular.

Simple or abſolute property, is when a man HAS IT, and no other has or can have it from him, or WITH him, but by his own act or default.

The ſpecial or PARTICULAR property is of two kinds, viz.

Such as ſome OTHER has a CONCURRING intereſt with him therein.

Such wherein, though no other has any concurring intereſt with him, yet his property is but TEMPORARY, and vaniſhes by certain accidents or occurrences.

The former kind of thoſe ſpecial or particular properties are very various, viz.

The intereſt that a man has by BAILMENT:

The intereſt he has in goods PLEDGED: or,

The intereſt he has in goods CONDITIONALLY granted.

The intereſt he has in things DISTRAINED, or, a diſtreſs.

The intereſt of goods demiſed for A TERM.

The ſecond kind of ſpecial property, wherein though NO OTHER has a property, nor indeed are the things in themſelves capable of any CERTAIN or SURE property, yet a man by certain contingents or accidents may have a TEMPORARY property in them; ſuch are things FERÆ NATURÆ; wherein a temporary property may be lodged upon theſe grounds, viz.

RATIONE IMPOTENTIÆ; as in YOUNG birds in a neſt upon MY tree.

RATIONE LOCI; as conies and hares while in MY ground.

RATIONE PRIVILEGII: as of birds or beaſts of warren while within MY warren, and ſwans within MY liberty.

Touching mixed properties, i. e. partly in action, and partly in poſſeſſion. They are ANNUITIES; wherein a man may have a perſonal inheritance.

Thus far of property or right in things perſonal.

The ſecond thing propounded, is THE CAPACITY wherein a man may have them; and that is double:

IN JURE PROPRIO.

IN JURE ALTERIUS.

And this latter is of two kinds;

As a body politic.

As executor in right of the teſtator.

The third thing propounded is, the MANNER of the acqueſt, or tranſlation of property. And becauſe both of theſe will be much of one conſideration, I ſhall join them in the courſe of my diſtributions.

Perſonal things, either in action or poſſeſſion, may be acquired or transferred three ways:

By act in law.

By act of the party.

By a mixed act, conſiſting of both.

SECT. XXVII.

Of acquiſition of property by act IN LAW.

THIS acquiſition by act IN LAW may be many ways, viz.

By

By SUCCESSION, whereby properties are transferred to the ſucceſſors of ſuch a corporation by law or cuſtom, which has a power to receive perſonal things in a politic capacity; as,

A ſole corporation by CUSTOM:

An aggregate corporation, by COMMON LAW.

By DEVOLUTION, viz.

To the executor.

To the ordinary.

To the adminiſtrator.

To the huſband by the intermarriage, i. e. as to perſonal things IN POSSESSION, but NOT as to perſonal things IN ACTION.

By PREROGATIVE; whereby they are given to the king, or to ſuch as have the king's title, by grant or preſcription; as, waif, ſtray, wreck, treaſure trove.

By CUSTOM; as in the caſe of heriot cuſtom, and heriot ſervice, mortuaries, heir looms, foreign attachment, aſſignment of bills of exchange.

By JUDGMENT, and EXECUTION thereupon; which in the caſe of the king extends as well to things in action that have a certainty in them (as debts,) as to things in poſſeſſion. But in the caſe of a common perſon, ONLY as to things in poſſeſſion.

And this by,

FIERI FACIAS: or,

ELEGIT.

By SALE in market-overt. Devant 16.

SECT. XXVIII.

Acquiſition of property by act of the party, and mixed act.

ACquiſition of property BY ACT OF THE PARTY, may be three ways, viz.

By grant.
By contract.
By aſſignment.

And herein is conſiderable,

That in THE KING's caſe it extends as well to things in action as in poſſeſſion; for DEBTS may be aſſigned TO HIM, or BY HIM.

In the caſe of other perſons, only things in POSSESSION are aſſignable.

Acquiſition thereof by a mixed act, partly by act of law, and partly of the party.

And thus things in action, as well as in poſſeſſion, are transferrable two ways.

By act of the party, with CUSTOM CO-OPERATING.

Thus a bill of exchange is aſſignable.

By operation of the law, concurring with the act or default of the party; as, FORFEITURES of ſeveral kinds, viz.

By outlawry in a perſonal action.

By being put in exigend in the caſe of felony.

By attainder of treaſon or felony.

By motion to the death of any perſon; as deodand.

And thus far concerning the rights of things perſonal.

SECT. XXIX.

Concerning the rights of things REAL.

I Now come to the rights of things real; and herein I ſhall hold this method.

I ſhall conſider the rights of the things themſelves, or the various intereſts and eſtates in things real, viz.

The

The different NATURE of eſtates or intereſts in things real, in relation to,
Their nature and extent;
Their limitation or qualification.
The different RELATION of thoſe eſtates, with reſpect to the POSSESSION.
The different QUALITIES thereof in reſpect of the perſons having the ſame. Vide ſect. 32.

As to the difference of eſtates, with relation to their nature and extent, they will be divided into,

Eſtates by the courſe of the common law;
Eſtates by cuſtom, or COPYHOLDS.

Eſtates by courſe of the common law are divided into, Pref. Co. Lit.

Eſtates of inheritance.
Eſtates leſs than inheritance;

Eſtates of inheritance are,
FEE-SIMPLE.
FEE-TAIL.

SECT. XXX.

Of eſtates in fee-ſimple and fee-tail.

OF an eſtate in fee-ſimple; wherein is conſiderable,
The extent and nature of the eſtate;
The quality incident thereunto.

As to the extent and nature of the eſtate:
It is an eſtate TO A MAN AND HIS HEIRS FOR EVER. And a fee-ſimple is either,
Abſolute; Co. Lit. 1 8.
Limited or qualified.

An abſolute fee-ſimple is ſuch as has no bounds or limits annexed to it, and is an eſtate to a man and his heirs ABSOLUTELY for ever.

A limited or qualified fee-ſimple is ſuch as has ſome collateral matter annexed to it, whereby it is made by ſome means determinable; viz.

By limitation; or,

By condition.

The QUALITY of an eſtate in fee-ſimple is, that it is tranſmiſſable in the very nature of the eſtate;

To the SUCCESSOR in bodies corporate by a right of ſucceſſion:

To the HEIR in the caſe of perſons NATURAL by deſcent.

To any other perſon by ALIENATION.

As to the former of theſe,

The nature of the corporation directs the rule of ſucceſſion.

As to the ſecond;

The rules of deſcents are directed,

Inf. Sect. 33. By cuſtom.

By common law.

By cuſtom; as,

Bacon's Hiſt. part 1. p. 106. To ALL the SONS in GAVELKIND.

To the YOUNGEST in BURROW ENGLISH.

By the common law, wherein the rules of the common law give the direction.

But of this more at large in ſect. 33.

The ſecond eſtate of inheritance is FEE-TAIL.

And herein are likewiſe obſervable,

The nature and extent of the eſtate;

The incidental qualities thereof.

As to the firſt of theſe,

The manner of its limitation is that which DEFINES AND CIRCUMSCRIBES IT: and that is either,

Co. Lit. Sect. 13. GENERAL; when an eſtate is given to one, and the heirs of HIS BODY; the heirs MALE of his body, or the heirs FEMALE of his body.

SPE-

SPECIAL; as when it is limited to a man, and the heirs of his body BY SUCH A WOMAN; or e converſo.

And here falls in a conſequent of ſuch a limitation; namely,

An eſtate tail AFTER POSSIBILITY of iſſue extinct. Sect. 31.

As to the incidental qualities, or qualities incident to ſuch an eſtate, they are,

In relation to the hereditary tranſmiſſion thereof;

In relation to the alienation thereof.

In relation to the hereditary tranſmiſſion thereof, the rules of deſcent DIRECT the manner of it. Inf. Sect. 33.

In relation to the alienation thereof. Regularly by the ſtat. DE DONIS CONDITIONALIBUS they have no power of aliening, ſo as to bar the iſſue, reverſion, or remainder.

And therein are conſiderable,

What alienations are VOID by his death, either,

By the ſtat. de donis conditionalibus.

By the ſtat. 11 H. 7. of jointreſſes.

What alienations are voidABLE only, viz.

By entry.

By action.

By ſuit.

And therein of diſcontinuances.

What alienations BIND the iſſue in tail, but NOT the reverſioner, viz.

A fine with proclamations, by ſtat. 4 Hen. 7. Co. Lit: 372.

A leaſe for three lives, &c. and accuſtomable rent, by ſtat. 32 H. 8.

Attainder of treaſon, by ſtat. 33 H. 8.

A warranty collateral, lineal, with aſſets. Co. Lit. 374.

What alienations bind both the iſſue and the reverſion, viz.

A COMMON RECOVERY purſuant to law.

And

Co. Lit. 372. b. And here of common recoveries;
Their kinds:
Their effects.

SECT. XXXI.

Of eſtates at common law, LESS *than inheritance.*

THE ſaid eſtates are conſiderable likewiſe;
In their nature and kinds:
In their incidents.
In their nature and kinds, they are either,
Eſtates of freehold.
Eſtates LESS than freehold.
Eſtates of FREEHOLD are again divided into,
Such as ariſe by act of law;
Such as ariſe by act of the party.
Freehold eſtates ariſing by act of law are,
Tenant by the curteſy of England;
Sect. 14. Tenant in dower.
And here of the learning of both theſe.
Freehold eſtates ariſing by act of the party are,
Tenant for his OWN LIFE: which is either,
Simply ſo; or,
With a privilege annexed; as,
Tenant after poſſibility, de quo ſup
Tenant PUR AUTER VIE.
And herein of occupancy,
General.
Special.
As alſo of eſtates limited to one and his heirs, PUR AUTER VIE.
Eſtates LESS than freehold are of two kinds:
Certain.
Incertain.
Eſtates leſs than freehold CERTAIN, are leaſes for years.

And

And here alſo of leaſes by ſtat. merchant, ſtat. ſtaple, and elegit.

And likewiſe the learning of extents, re-extents, audita querela, &c.

INCERTAIN eſtates leſs than freehold are, Tenants AT WILL (*i*).

Theſe are determinable at the will of either party.

The incidents to all theſe particular eſtates, EXCEPT TENANCY AT WILL, are theſe, viz.

They are transferrable from one to another, unleſs particularly RESTRAINED,

By condition; or,

By limitation.

They are forfeitable.

And here of the various forfeitures of particular eſtates; as,

Such as give a right or title of entry to him in reverſion.

Such as give a remedy by action, as, waſte.

And here of the title waſte. Inf. Sect. 42.

SECT. XXXII.

Of the diſtinction of RIGHTS *of eſtates, with relation to the* POSSESSION.

HAVING gone through the ſeveral kinds and natures of eſtates both at common law and by cuſtom, I come now in the ſecond place to the various relations that theſe eſtates have TO THE POSSESSION; which gives ſeveral other determinations unto the rights that perſons have to them. Vide §29.

Theſe eſtates before mentioned, and the rights thereupon, are either,

(*i*) But ſee Blac. Com. 2 v. oct. 145 to 150.

Such

Such as are IN poſſeſſion;
Such as are NOT in poſſeſſion.

The right of eſtates IN poſſeſſion, is where there does not interpoſe any eſtate or intereſt between the right and the poſſeſſion of the thing; as,

Tenant for life IN POSSESSION;
Tenant in fee IN POSSESSION, &c.

The rights that are NOT immediately in poſſeſſion, are either,

Where the time of their enjoyment EXPECTS the accompliſhment of ſomething elſe, that MUST ANTECEDE it.

Where the RIGHT or eſtate perchance is immediately IN the party; but the poſſeſſion thereof is removed or detained by another.

As to the former of theſe, they are of ſeveral kinds, viz.

REVERSIONS; which though a preſent intereſt, yet ſtands in a degree removed from the poſſeſſion till the particular eſtate be determined.

REMAINDERS.

FUTURE INTERESTS of terms for years.

CONTINGENT intereſts; or intereſts or eſtates limited to take place upon a precedent condition.

This is frequent in caſes,
Of accrewers.
Of contingent uſes.

ESTATES ſubject to a condition of re-entry; wherein he that has the benefit of the condition, though he has an eſtate in the condition, yet he has not the land till the condition broken, AND a re-entry.

Where the eſtate is deveſted, or removed, or detained, by another;

This gives two new and additional denominations, viz.

A TITLE of an eſtate.
A RIGHT of an eſtate.

A title

A title of an eſtate, is where a man has not yet the poſſeſſion, but has a title to have it, by reaſon,

Of a condition broken;

Of a title of entry given by forfeiture: 3 Eliz. c. 20.

Of a title of entry by reaſon of acts of parliament.—

As title of entry for mortmain.

For aſſent to a raviſher, &c.

A RIGHT of an eſtate, is where a man is put out of his eſtate by the wrong of another.

Hereby, though he has ſtill the right to have the eſtate he had before, yet he has not the eſtate itſelf in poſſeſſion.

And thoſe rights are of two kinds,

Remediable;

And

Remedileſs.

REMEDIABLE RIGHTS are of two kinds: viz. they are remediable, either,

By entry, which is called a right of entry;

By action, which is called a right of action.

And theſe are,

In caſe of uſurpation of advowſon.

In caſe of a diſcontinuance by tenant in tail, &c.

In caſe of a diſſeiſin or abatement, and a dying ſeized by ſuch diſſeiſor or abator, and a deſcent to his heir.

And here all the learning of

Entries congeable;

Diſcents que toll entry;

Continual claim;

Infants, when bound, &c.

REMEDILESS RIGHTS are where the remedy is taken away, though THE RIGHT REMAINS;

Which may be either,

By warranty, collateral or lineal, with aſſets. Supra, ſect. 30.

And here comes in the learning of bars and rebutters by warranty.

By nonclaim upon a fine.

By

By limitation of time. By the old, or the later ſtatutes, introduced in ſuch caſes, viz. 32 H. 8. 21 Jac. 1.

Vide §29. The third thing I propounded, was the different qualities and relations in regard of the perſons having the eſtate.

And theſe are,

SOLE TENANTS.

JOINTENANTS.

TENANTS IN COMMON.

And here comes in the learning of each of theſe.

SECT. XXXIII.

Touching acquiſition and tranſlation of eſtates in things real. Firſt, BY ACT IN LAW.

THUS far have I gone in a deſcription of the various natures, relations, and kinds of eſtates; and now I come to the manner or MEANS of their acqueſt or tranſlation.

And an eſtate or intereſt is thus tranſlated, viz.

By act of law;

By means of the party. Vide prox' ſect.

By act of law, there is a various acquiſition of things, according to their ſeveral natures, viz.

Of things real that are CHATTELS.

Of things real that are FREEHOLDS.

Of things real that are INHERITANCE.

As to the acqueſt of CHATTELS by act of law; though they are real, they are of the ſame kinds as things perſonal, therefore vide ante ſect. xxvii.

[Only with this additional exception, that chattels real go not to the huſband immediately by the marriage, UNLESS HE SURVIVES THE WIFE.]

As

As to the acqueſt of eſtates of FREEHOLD by act in law, there is only the title occupancy which here comes in;

And that is either { general. / ſpecial.

As to matters of INHERITANCE, the titles of acqueſts therein by law, ſeem to be of two kinds, viz.

Such as is applicable to all eſtates of inheritance, viz. DESCENT.

Such as is applicable only to the acqueſt of eſtates in FEE-SIMPLE.

The act in law applicable to the acqueſt of all eſtates of inheritance,—deſcent, or hereditary ſucceſſion, is either

Of an eſtate-tail: or,

Of an eſtate in fee-ſimple.

Touching the deſcent of eſtates-tail, THE MANNER OF THE LIMITATION DIRECTS THE DESCENT as aforeſaid.

Touching the deſcent of fee-ſimple, two things are conſiderable, viz.

The rules of the deſcent itſelf.

The burden or charges that lie upon the heir that takes by deſcent.

The rules of deſcents of fee-ſimple are directed, either,

By cuſtom; or,

By common law.

The direction of deſcents by cuſtom is various; as,

Sometimes to ALL the ſons, as GAVELKIND;

Sometimes to the YOUNGEST ſon, as BURROW ENGLISH.

Sometimes to the eldeſt daughter, or youngeſt, &c. as ſome cuſtomary lands.

Sect. 18.

The direction of deſcents by the common law, and the rules thereof, are divers, viz.

Relating to the QUALITY of the perſons in the line,

ASCENDING,

DESCENDING,
And TRANSVERSAL.
In relation to the number of perſons inheriting, viz.
ONE, if it be A MALE, is heir.
ALL, if they are FEMALES.
And here the learning of parceners and partition.
In relation to the IMPEDIMENTS of the deſcent; as,
ILLEGITIMATION,
HALF-BLOOD.
ATTAINDER,
Or CORRUPTION OF BLOOD.
The burden upon the heir: how and where chargeable;
With the debt or covenant of the anceſtor:
With the warranty of the anceſtor.
The ſecond kind of means of acquiſition by act in law, refers only to eſtates in fee-ſimple; as,
Firſt, by preſcription or cuſtom; which is,
Of things IN GROSS and SUBSTANTIVE:
And thus a right of an incorporeal inheritance is gainable.
Of things incident and appurtenant,
And here of preſcription or cuſtom; the nature, kinds, and effects thereof.
Ante, ſec. xix. Secondly, by ESCHEAT; which is either,
For default of heir.
For attainder of the tenant, viz.
For felony,—to the lord.
For treaſon,—to the king.

SECT. XXXIV.

Concerning acqueſts by the means of the party. And firſt, by RECORD.

ACqueſts of eſtates, by the means of the party himſelf, may be of two kinds, viz.

By

By wrong;
By right or title.

Acquiſitions BY WRONG are alſo of two kinds, viz.

By wrong to a chattel; as,
Ejectment of farm.
Ejectment of gard.
By wrong to a freehold; as,
Abatement;
Diſſeiſin;
Intruſion;
Uſurpation.

Acquiſition by right or title, is likewiſe of two kinds;

By CONVEYANCE:
By FORFEITURE.

Acquiſition by conveyance. Here may be brought in all the methods and courſes of aſſurances and conveyances of lands, which lets in the moſt ample and conſiderable part of the law.

Conveyances therefore are of two kinds:

By matter OF RECORD.
By matter IN PAIS.

By matter of record, they are either,
By fine.
By common recovery.
By deed enrolled.

By FINE; where comes in all that learning, viz.
Their kinds;
Their effects.

Their kinds are in general two, viz.
Fines at common law.
Fines with proclamations.
And here of their kinds in ſpecial.

Their effects;
In relation to bar privies, or conveyance of eſtates.
In relation to ſtrangers, non-claim.

As to COMMON RECOVERIES, therein are conſiderable;

Their kinds, with treble, double, or ſingle voucher.

Their effects;

In relation to transferring or barring eſtates in fee-ſimple.

In relation to barring eſtates tail, remainders, reverſions, &c.

As to DEEDS ENROLLED, they are of three kinds, viz.

Deeds enrolled by ſpecial cuſtom; as in London.

Deeds enrolled at common law.

Deeds enrolled in purſuance of the ſtat. 27 H. 8. or bargain and ſales enrolled:

Whereof hereafter, ſect. 36.

SECT. XXXV.

Concerning conveyances by matter IN PAIS, *and firſt, of deeds.*

CONveyances by matter in pais are of two kinds, viz.

Conveyances without deed.

Conveyances by or with deed.

Conveyances IN PAIS without deed, are either,

Of chattels; or,

Of freeholds.

Of CHATTELS; as leaſes, or extents of land; and may be either,

By grant or aſſignment;

By parol;

By exchange; quære.

Of FREEHOLD of lands, by livery. Of this hereafter.

Conveyances IN PAIS, with or by deed.

Here we may conſider,

The nature of deeds themſelves.

Their

Their effect or efficacy in relation to,
Acquiring / Transferring } Eſtates.

Concerning the nature of deeds, they are conſiderable;

Simply in themſelves:
And here the whole learning of deeds, viz.
Of the parties thereto, and their names.
Of the kinds of deeds, viz. indented and poll.
Of the parts conſtituting deeds; ſealing and delivery, &c.

With RELATION to the paſſing of eſtates; and ſo they are called,
Charters,
Grants,
Feoffments.

Deeds SIMPLY conſidered:
Their conſtituent parts, SEALING and DELIVERY.
The parties to them; GRANTOR and GRANTEE, &c. their names, &c.
Their kinds, INDENTED, and POLL; and the EFFECTS reſulting from both or either;
Particularly of eſtoppel.

Deeds conſidered with relation to their USE, eſpecially in grants, feoffments, and other conveyances.

And herein we conſider,
Their kinds;
Their ſeveral parts.

As to the kinds of deeds, they are either,
Such as have their efficacy without the adjunct of ſome other ceremony.
Such as to their EFFECTS require another ceremony to be joined with them.

As to the former of theſe, they are of three kinds:
Grants;
Releaſes;
Confirmations.

As to GRANTS: there are many things that are of an INCORPOREAL nature; as, [advowſons, tithes, liberties, commons, &c.] that,

Cannot paſs from one to another by act of the party without deed. Yet,

2Co.23.b. Paſs by deed without any other ceremony requiſite.

As to RELEASES, they are of ſeveral kinds, viz.

Releaſes, whereby the thing releaſed is EXTINGUISHED in the poſſeſſion of the releaſee; as, rights, common, ſeigniories, rents, &c. and other profits iſſuing out of lands by releaſe to the tenant.

Releaſes whereby an eſtate is transferred, which is either,

By MITTER LE ESTATE, as of one jointenant to another.

By ENCREASE or ENLARGEMENT of the eſtate, being made by the reverſioner to the leſſee in privity, with apt enlarging words.

As to CONFIRMATIONS, they are of two ſorts, viz.

CORROBORATING the eſtate of which it is made; as, dean and chapter confirming the grant of the biſhop; patron and ordinary confirming the grant of the parſon; or the diſſeiſee that of the diſſeiſor.

ENLARGING the eſtate with apt words; as, in caſe of releaſe.

As to the other ſort of deeds that require a ceremony CONCOMITANT with them, to make them effectual, viz.

A LIVERY OF SEISIN in the caſe of a feoffment, though by deed;

And here comes in all the learning of livery, letters of atterney to make or receive it, &c.

ATTORNMENT requiſite in caſes of grants, of reverſions, remainders, rents, ſeigniories.

And

And here of attornments; how, by whom, and when to be made.

And the ſeveral effects thereof, viz.

To create a privity of diſtreſs, or action; as in the caſe of fines, quid juris clamat, quem redditum reddit, per quæ ſervitia.

To paſs THE INTEREST, as in caſe of grants, ſingly by deed.

Thus far of the nature of deeds in reference to the acqueſt of lands.

But there are beſides this, in relation to deeds paſſing lands, ſeveral parts that uſually occur in deeds, and which take up large titles, viz.

The PARTIES, and therein their names, and names of purchaſe; as grantor, grantee, feoffor, feoffee.

The PREMISES of the deed; containing,

EFFECTUAL WORDS to paſs the intereſt, as grant, enfeoff, &c.

The thing granted, which takes in the whole title of comprize, and pient comprize, viz.

By what names things paſs:

What things are COMPRIZED within the grant, viz.

Things in GROSS.

Things PARCEL.

Things INCIDENT, APPENDANT, APPURTENANT, &c.

The HABENDUM of the deed, WHICH LIMITS THE ESTATE; and what words are apt for this.

The RESERVATION or REDDENDUM; and what ſhall be ſaid a good reſervation.

The COVENANTS; which are of two kinds:

Covenants PERSONAL, and their expoſition.

And here of covenants; as,

What ſhall paſs with the land, and what not;

Their expoſition.

Covenants REAL, which is warranty.

And here of that learning; as,

What their KINDS;

General,
Special,
Lineal,
Collateral.

What their EFFECTS:
By way of ACTION, VOUCHER, WARRANTIA CHARTÆ.
By way of BAR, or rebutter.

The CONDITION or DEFEASANCE.

And here all the learning of conditions and limitations: and incident to this learning of deeds, falls in thoſe two great titles, viz.
MONSTRANCE DE FAITS, or where deeds are neceſſary to be pleaded or ſhewn.
EXPOSITION DE FAITS; which is full of infinite variety, according to the texture of deeds, and their ſeveral clauſes.

SECT. XXXVI.

Of conveyances by force of ſtatutes.

AND thus far of conveyances according to the courſe of the common law; and now I proceed to conveyances, according unto, or by force, or power, OF ACTS OF PARLIAMENT.

Conveyances according to, or by virtue of acts of parliament, are of two kinds, viz.

By way of BARGAIN AND SALE, according to the ſtat. 27 H. 8.

By way OF USE.

And this latter is either,

With tranſmutation of poſſeſſion; as,
By feoffment or fine.

Without tranſmutation of poſſeſſion;
By covenant to ſtand ſeized.

And this is a large field, for all the learning of USES come in here; as,

Of

Of CONSIDERATIONS ſufficient to raiſe it.

CONTINGENT USES, &c.

How deſtroyed;

How revived.

By way of DEVISE.

And here all that voluminous title of deviſes, and the incidents thereto, may be introduced.

SECT XXXVII.

Concerning CUSTOMARY *eſtates.*

THUS far of eſtates atcommon law; we come now to cuſtomary eſtates, viz. tenant by VIRGE, or by copy of court-roll.

And becauſe this is a SPECIAL kind of cuſtomary eſtate, and I ſhall not have again to do with it, I ſhall ſhortly conſider theſe two things, viz.

The nature or kinds of eſtates grantable thereof.

The incidents relative thereunto.

Touching the nature of eſtates grantable, THE CUSTOM DIRECTS IT.

For by cuſtom it is grantable,

In fee-ſimple;

In fee-tail: and here of the entailing copyholds, where it may be, and how barred.

For life or lives.

Touching the incidents relative to copyholds, they conſiſt either in,

Modes of acquiring: or,

Manner of transferring.

Touching the transferring the intereſt of the copyholder, it is done,

By

By hereditary deſcent; and here of what effect or uſe the heir's admiſſion is.
By ſurrender: which is either,
In court. Or,
Out of court, into the hands of the lord, the ſteward, or cuſtomary tenants,—when warranted by the cuſtom.
And the effect of ſuch ſurrender; where, when, and how it muſt be preſented.

The learning concerning copyholds is grown very large, and takes in very many particulars: For inſtance;

Who is lord to make a grant or admittance: what a DOMINUS PRO TEMPORE, or a diſſeiſor, may do therein.
Who is a ſteward to perform that office, and his power therein.
What ſhall be ſaid a copyhold manor, or a copyhold court, to enable ſuch grants.
What ſhall be ſaid a forfeiture of a copyhold eſtate:
By waſte,
By alienation;
By refuſal to perform ſervices.
Who ſhall be bound by ſuch forfeiture.
Who ſhall take advantage of it.
What ſhall be a diſpenſation with it.

Beſides which, there are very many more conſiderables will fall under the title of cuſtomary eſtates, or copyholds.

SECT. XXXVIII.

Of tranſlation of property BY FORFEITURE.

I Now come to thoſe tranſlations of eſtates which happen BY DEFAULT of the tenant in fee-ſimple, viz. ſuch as are forfeitures of his eſtate.

And

And theſe are of ſeveral kinds:

Forfeiture BY ATTAINDER; either,

Of TREASON—which gives the land to the king by the common law. (And this lets in all the learning touching offices, petitions, &c.) or,

Of FELONY; whereby it eſcheats to the lord; whereof before, ſect. 33.

Forfeiture by purchaſe in mortmain WITHOUT LICENCE, whereby it goes to the lord.

Forfeiture BY CESSING from doing his ſervices PER BIENNIUM. And here comes in the learning of ceſſions.

Forfeiture by alienation CONTRA FORMAM COLLATIONIS.

SECT. XXXIX.

OF WRONGS OR INJURIES. *And firſt, of wrongs to perſons.*

I Come now from the conſideration of rights or JURA, to conſider of wrongs or INJURIÆ; wherein I ſhall take this order, viz.

Firſt, I ſhall purſue the ſeveral natures of injuries, as they are ſeverally applicable to thoſe things, which are the ſubjects whereto the ſeveral rights aforeſaid are adherent.

Secondly, becauſe it will be a ſhorter and plainer way to mention the ſeveral natures of the remedies applicable to the ſeveral kinds of injuries, or wrongs, I ſhall mention THOSE ACTIONS that are applicable to the ſeveral injuries, together with the injuries themſelves; leaving the farther explication of the manner of application of thoſe remedies unto the third and proper head, concerning RELIEFS OR REMEDIES.

As to injuries, or wrongs, they are of two kinds, viz.

Such as are of eccleſiaſtical conuzance.

Such as are of temporal conuzance.

Such as are of eccleſiaſtical conuzance, are either,

Criminal, or,

Civil.

The wrongs CRIMINAL of eccleſiaſtical conuzance, are ſuch as are PUBLIC ſcandals and offences, wherein the judge eccleſiaſtical proceeds, either,

At the proſecution of ſome perſon: or,

EX OFFICIO, & PRO SALUTE ANIMÆ; as,

In caſes of adultery, fornication, inceſt, prophanation of ſacred things or times, (or places,) blaſphemy, hereſy, and divers others.

Wrongs CIVIL of eccleſiaſtical conuzance, are of theſe kinds, viz.

DEFAMATION in ſome particulars.

TITHES,—their right, ſubſtraction, &c. as alſo oblations, mortuaries, penſions.

Cauſes of SPONIATION in relation to benefices eccleſiaſtical.

Matters of MATRIMONY and DIVORCE.

WILLS or teſtaments, and adminiſtrations.

Thoſe wrongs that are of TEMPORAL conuzance, are of three kinds:

Such as are of the conuzance of the admiral's court; as piracy, depredations, and wrongs ON THE HIGH SEA.

Such as are of the conſtable and marſhal's court; as, uſurpation of coats of arms, matters of precedence, &c.

Such as are of the conuzance of the common law courts.

This latter head is very large and extenſive; but, in general, may be divided into two kinds:

Such

Such as are criminal or public, wherein the wrong-doer is proceeded againſt criminally. And theſe are to be diſtributed under the titles of PLEAS OF THE CROWN,

Such as are civil or private; wherein at the ſuit or proſecution of the party injured, he has reparation or right done.

Touching injuries to CIVIL rights or intereſts, they muſt be diſtributed according to the ſeveral natures and kinds of thoſe rights which by thoſe wrongs are injured. And ſince we have already before conſidered of two ſorts of rights, viz. rights of perſons, and rights of things, I ſhall begin with thoſe wrongs that relate to the rights of PERSONS.

And ſince in the diſtribution we have made of the rights of perſons, we have obſerved, that the rights of perſons have a double conſideration, viz:

One ABSOLUTE, in reference to the perſon himſelf; and,

Another RELATIVE, with reſpect to the perſons related to him:

We ſhall diſtinguiſh wrongs accordingly.

Wrongs therefore of common law conuzance, which are private or civil, are ſuch as are done either,

By PARTICULAR perſons; or,

By countenance of LEGAL proceedings.

And the former part of theſe wrongs, are done either,

To the rights of perſons; or,

To the rights of things annexed to perſons, in point of property or eſtate.

As to wrongs that are done to perſons, or in relation to the rights of perſons, they are of two kinds;

Such as relate to the perſon conſidered abſolutely and IN HIMSELF:

Such as relate to him, as he ſtands in ſome kind of RELATION to another perſon.

As

As to ſuch wrongs as relate to the perſon himſelf, they are of three kinds. Every man has a right to his own perſon; and a wrong done to that, is neareſt to him, becauſe a man has the greateſt property in his own perſon.

And the wrongs thereunto are alſo of two kinds, viz.

WRONGS TO HIS BODY;

WRONGS TO HIS NAME OR REPUTATION; for I reckon this amongſt thoſe wrongs that are done to his perſon.

The wrongs to his BODY are of two kinds, viz.

ASSAULTS; as, beating, maiming, wounding.

Wherein the law gives a double remedy, viz.

PREVENTIONAL; by ſecurity of the peace.

REMEDIAL, by action, either of

Treſpaſs,
Aſſault,
Battery,
Wounding,
Appeal of mayhem.

2 Inſt. P. 55. IMPRISONMENT, without lawful or juſt cauſe: Wherein the law alſo gives him a double remedy, viz.

TO REMOVE or AVOID the impriſonment; as by habeas corpus into the king's bench or common pleas, writs of mainprize, de odio & atia, de homine replegiando, &c.

TO RECOVER DAMAGES by way of compenſation for it, by action of falſe impriſonment; or if the impriſonment be lawful, but the party bailable, and his bail REFUSED, in ſome caſes a ſpecial action of the caſe upon the ſtat. 23 H. VI.

As to wrongs done to his NAME, they are of two kinds, viz.

SCANDAL by words ſpoken,—libels,—pictures, &c. wherein the remedy is to have com-

compenſation in damages by action on the caſe.

And here comes in all that large title of ACTIONS OF SLANDER, and what words are ſcandalous.

Under PRETENCE of a legal proſecution, but FALSE and MALICIOUS; as, for a falſe and malicious impoſing ſome great crime by complaint to a juſtice of peace, or by preferring a bill of indictment falſly and maliciouſly.

The remedy the law gives, is,

Sometimes by an action of conſpiracy.

Sometimes, and more ordinarily, by action UPON THE CASE.

SECT. XL.

Of wrongs to perſons UNDER RELATION.

THE wrongs that are done to a perſon under ſome kind of relation, principally take in the three ŒCONOMICAL relations before mentioned; as,

Huſband and wife.

Parent and child.

Maſter and ſervant.

And ſome of the civil; as,

Guardian and pupil.

Lord and tenant, &c.

Firſt, for huſband and wife; as where the wife is taken away from the huſband, the law has provided a remedy for him by action of treſpaſs DE UXORE ABDUCTA. So if ſhe be beaten, a ſpecial action of treſpaſs (on the caſe) for

for beating his wife, PER QUOD CONSORTIUM AMISIT.

As to parent and child: wrongs of this kind are either,

By taking away the child under age OUT OF THE CUSTODY of the parent, where the remedy is action of treſpaſs.

By taking away, and marrying the heir within age: the remedy is, treſpaſs or raviſhment, to recover damages, and the value of the marriage.

As to maſter and ſervant:

If a ſervant be retained by another before his time is expired; remedy is, action ON THE CASE.

If a ſervant be beaten, whereby he is DISABLED to work; the remedy is, action of treſpaſs or caſe, PER QUOD SERVITIUM AMISIT (*k*).

We come now to intereſts of civil relations, and the wrongs therein reſpect,

Guardian and pupil.

Lord and tenant.

Lord and villein.

As to the firſt of theſe, the guardian has an intereſt in the pupil in theſe two kinds of guardians:

Guardian in knights-ſervice.

Guardian in ſocage (*l*).

If the ward be taken away, or taken away and married, it is a wrong to the guardian, and remediable;

By treſpaſs.

By writ of raviſhment of ward.

By writ of right of ward.

As to that of lord and tenant. If they be tenants AT WILL, and either by menaces, or by unlawful diſtreſſes, they are driven away from

(*k*) Vide the caſe of Poſtlethwaite and Parkes, 3 Bur. 1878.

(*l*) But ſee 16 Car. 1. c. 20. and 12 Car. II. c. 24. See alſo Blac. Com. 1 v. 462. 2 v. 67, 88.

their

their tenancies, it is a wrong which the lord may repair himſelf in, by ſpecial action on the caſe.

So if a villein be forced from his ſervice, or beaten or maimed ſo that he is diſabled to perform ſuch ſervice, an action of treſpaſs lies, per quod ſervitium amiſit. Vide ante ſect. 1. 21.

SECT. XLI.

Of wrongs in relation to rights of things. And firſt, of things perſonal.

HItherto of wrongs as they relate to perſons, either abſolutely, or under relations œconomical or civil; I come now to ſuch wrongs as relate to THINGS, and thoſe are either,

To things perſonal,

To things real.

Wrongs relating to things PERSONAL are of theſe kinds, viz. according to the nature of the things:

Perſonal things IN POSSESSION,

Perſonal things IN ACTION.

As to perſonal things in poſſeſſion, viz. goods, cattle, money, &c. the wrongs thereto are of two kinds:

An unjuſt taking; or a taking and detaining of them, which is an injury; and for which the party grieved has his remedy, viz. either,

To have the things themſelves, if detained, by REPLEVIN,

To have reparation in point of damages by action, either of treſpaſs VI & ARMIS; or of trover and converſion.

An unjuſt DETAINING, without an unjuſt taking,

The remedy:

The thing IN SPECIE,—by replevin, if taken for damages only; or,

Trover and converſion for the THING, or if it can't be had, for damages by DETINUE (*m*).

And although CHARTERS concerning land be IN THE REALTY in reſpect of their relation to the land;—yet they are not IN THEMSELVES any more than paper, or parchment, and wax; and therefore are within the aforeſaid rules, in reſpect of taking or detaining them.

Perſonal things IN ACTION are likewiſe of two kinds:

Such things in action as ariſe by EXPRESS contract or agreement.

Such things in action as ariſe by IMPLIED contract, or QUASI EX CONTRACTU.

The former kind are of two ſorts:

By deed or ſpecialty.

Without deed or ſpecialty.

Thoſe that are with or BY SPECIALTY are alſo of two kinds, viz.

DEBTS:

And the wrong that relates to them is non-payment according to the deed.

The remedy is action of debt, to recover the debt ITSELF, and damages for non-payment.

(*m*) There ſhould ſeem to be ſome miſtake, in the ſentence to which this note is meant to apply. An action of trover, does not, as I conceive, lay to recover the THING converted, but to recover DAMAGES for the converſion. On a recovery in trover, the property of the goods is changed, and legally veſted in the defendant. Stra. 1078. On the other hand, the immediate object of the action of detinue (unleſs for a ſubſequent detainer, where the original caption was legal) is, I apprehend, the POSSESSION of the thing detained; for which reaſon, in this mode of action, it is neceſſary to aſcertain the thing detained, in ſo clear and explicit a manner, that it may be ſpecifically known and RECOVERED. F. N. B. 69. 138. But this action is now ſeldom, if ever, uſed; the preference, and that for very good reaſons, having for ſome time been given to the action of trover.

Co-

COVENANTS;

The wrong herein is breach of covenant.

The remedy, action of covenant: and here comes in the learning of covenants;

What words make a covenant.

What covenants paſs to the aſſignee, &c.

Thoſe that are without ſpecialty,

DEBTS:

The wrong and remedy the ſame as before, in caſes of debts by ſpecialty.

And hither alſo may be referred thoſe things, which though they ſavour of the REALTY, are yet recoverable by action of debt; as rents reſerved on leaſes for years, relief, &c.

PROMISES for a good conſideration; whether they be promiſes that ariſe by law, or ſuch as are collateral.

Remedy in all ſuch caſes, is to recover damages by action ON THE CASE;

And here comes in WARRANTY of chattels UPON SALE.

Such things in action as ariſe by an IMPLIED contract are many: for inſtance;

In contracts for things, it is generally intended, THAT NONE SELL ANY THING THAT HE KNOWS NOT TO BE HIS OWN; if he does, an action on the caſe lies in nature of DISCEIT.

In contracts FOR VICTUALS, it is implied, THAT THEY ARE NOT UNWHOLSOME; if they be, an action on the caſe lies.

In perſons that undertake a COMMON TRUST, it is implied, THAT THEY PERFORM IT; otherwiſe an action on the caſe lies.

As for inſtance;

In the caſe of,

A common hoſt, that he ſecure goods in his inn.

A common carrier or bargeman, that he ſecure the goods he carries.

A common farrier, that he perform his work WELL, without hurting the horſe.

A common taylor, that he does his work WELL; and ſo of other tradeſmen, &c.

SECT. XLII.

Touching wrongs to things REAL,—*without diſpoſſeſſing the party*;—*and their remedies.*

I Come now to thoſe wrongs or injuries which are done to things REAL, and the rights of them.

And theſe may be divided, in theſe two kinds, viz.

Such as are WITHOUT a removing the owner or proprietor out of poſſeſſion:

Such as are WITH a remover of him out of his poſſeſſion.

Thoſe which are without a remover out of poſſeſſion, are of ſeveral kinds: I ſhall reduce them to theſe following, viz.

TRESPASSES by breaking any man's ground, hedges, &c. by the party treſpaſſor himſelf, or by his command, or by his cattle, &c.

Remedy, to repair the party in damages, by action of treſpaſs, QUARE CLAUSUM FREGIT.

NUISANCES, or annoyances, either

To intereſts in things corporeal; as houſes, &c. by ſtopping lights, erecting lime-kilns, or things annoying another's dwelling; or withdrawing water from a miil, &c.

Or,

Or, to things INCORPOREAL; as,
To CHEMINS or ways, by obſtructing them, &c.
To MARKETS, by erecting another market too near them.
So of FERRIES, by erecting another too near:
And infinite more inſtances may be given, the title of nuſances being very large.
The remedies in all theſe caſes are either,
Without ſuit, TO ABATE, OR TO REMOVE THEM,—if done to inheritances corporeal, or chemins.
By ſuit; as,
Quod permittat, aſſiſe of nuſance, to remove the thing, and recover damages.—Or,
Action on the caſe to recover damages. Vide ſect. 46 & 47.

DISTURBANCES: and this principally concerns ſuch real things as are INCORPOREAL; for inſtance;
Diſturbance to preſent to a church preſentable: and this concerns advowſons, and right of patronage.
And the remedies relating thereunto are,
Quare impedit;
Aſſize de darrein preſentment;
Quare incumbravit;
Ne admittas;
Breve epiſcopo ad admittend' clericum:
And this is a vaſt and a curious piece of learning.
Diſturbance of a perſon to enjoy his FRANCHISES; as,
Diſturbing ſuch as come to my market, or to my leet.
Forcing them to come to another court.
Not permitting a perſon to hold his court, or take his toll.

And many more of the like.

The common remedy herein is by action ON THE CASE.

Diſturbance of COMMONERS to enjoy their common; ſurcharging the common by one that has common; or by putting in cattle by one that has not common; by erecting a warren to the prejudice of the commoners.

Here the remedy in ſome caſes may be by admeaſurement, aſſize, quod permittat:

But in moſt, and indeed in all caſes of this nature, it is uſual by action ON THE CASE.

Diſturbances of WAYS.

The like wrongs,

And the like remedy.

The fourth ſort of injuries are, SUBSTRACTIONS of cuſtoms, duties, or ſervices real; as,

Suit to court;

Suit to mill;

Homage;

Fealty;

Rents, &c.

The remedies here are various.

For, firſt, if the ſervices are accompanied with A TENURE, the ordinary remedy is either,

Without ſuit,—BY DISTRESS.

And here of diſtreſſes, avowries, &c.

With ſuit; and then,

If they are rents reſerved on leaſes for years, the remedy is action OF DEBT:

If they are rents of freehold, remedies are by aſſize in caſe of leiſin and diſſeiſin.

If

If thoſe ſervices are WITHOUT TENURE, as ſuit to mill by cuſtom, &c. the remedies are SECTA AD MOLENDINUM, action on the caſe.

The fifth ſort of injuries is WASTE, or deſtruction.

And this injury is of two kinds, according to theſe relations, viz.

In relation between the owner of the ſoil, and he that has a profit apprendre out of it; as, eſtovers, pawnage, &c.

If the owner of the ſoil deſtroys the wood, the remedy lies by ASSIZE.

Action on the CASE to recover damages.

In relation between the particular tenant and he that has the reverſion or remainder of inheritance; as waſte in houſes, woods, lands, &c. is a diſinheriſon to the REVERSIONER, who has remedy either,

PREVENTIVE, by eſtrepement, prohibiting waſte; which alſo lies againſt a tenant, where the land is in ſuit. Or,

REMEDIAL, by action of waſte;

In the TENET;

In the TENUIT.

And here comes in a great flood of learning:

What ſhall be ſaid waſte: Supra, ſect. 31.

When, and againſt whom it lies, &c.

And although under this title of wrongs, WITHOUT REMOVAL OF POSSESSION, I have brought in remedies by aſſize, &c. which always ſuppoſes a diſpoſſeſſion, yet really it is no diſpoſſeſſion in thoſe caſes before inſtanced, becauſe they concern things INCORPOREAL; wherein, though the party may admit himſelf diſſeiſed, it is but a diſſeiſin AT ELECTION, and rather made a diſſeiſin by his bringing an aſſize, which the wrong-doer ſhall not diſpute, than truly ſo.

SECT. XLIII.

Concerning wrongs which carry with them an AMOTION *of poſſeſſion.*

THE wrongs which carry with them an amotion of poſſeſſion are of two kinds, and concern,

The rights of chattels;
The rights of freeholds.

As to the rights of chattels, whereof the party is diſpoſſeſſed by a wrong-doer, they are theſe, viz.

LEASES FOR YEARS.

The remedy is by EJECTIONE FIRMÆ; or if by the reverſioner, QUARE EJECIT INFRA TERMINUM.

In both which, at this day, he recovers damages, and the poſſeſſion of his term.

WARDSHIPS AND HOLDING OVER, for ſingle or double value.

The remedy is, quare intruſit maritagio non ſatisfacto—ejectione cuſtodiæ; and againſt a ſtranger, a writ of right of ward.

TENANTS by ſtat. merchant, ſtat. ſtaple, and elegit, though they have but chattels, yet the ſtatute gives them remedy for their poſſeſſions by aſſize.

I come to the rights of freeholds, and the wrongs done to them, together with an amotion of the poſſeſſion: and thoſe rights are of two kinds, viz.

Some only compatible to them that claim not only a freehold, but an INHERITANCE;

Some that are common to any that have a freehold ONLY:

And accordingly, their remedies will be ſeverally diverſified.

Theſe wrongs are of ſeveral kinds, viz.

Abatement;

Intruſion;
Diſſeiſin;
Uſurpation;
Diſcontinuance;
Deforcement.

ABATEMENT is where one enters AFTER the death of the anceſtor, BEFORE the heir enters.

The remedy is according to the nature of the deſcent from his anceſtor,
By aſſize of MORTDANCESTOR;
Writs of AILE, BESAILE, COSINAGE.

INTRUSION is an entring or continuing in poſſeſſion after an eſtate FOR LIFE determined.

The remedy: he in the reverſion or remainder may enter; or if his entry be taken away, has his writ of INTRUSION.

DISSEISIN is a large title, and is an unlawful ENTRY AND OUSTER of him that has an ACTUAL ſeiſin and freehold.

And it is either,
With force: in which caſe the party diſſeiſed has his remedy, either,
By writ of FORCIBLE ENTRY upon the ſtat. 8 H. 6. to recover the poſſeſſion, and damages.
By aſſize of NOVEL DISSEISIN to recover his poſſeſſion, and damages; and the party to be fined and impriſoned for his force.
By writ of ENTRY in nature of an aſſize, to recover his ſeiſin and damages.
Without force: and for this he has remedy by aſſize, or writ of entry, ut ſupra.

Now both theſe diſſeiſins are either of things incorporeal, or
Things corporeal.

Of diſſeiſins INCORPOREAL, this is not always a diſſeiſin at the election of the freeholder.

And

And diſſeiſins of inheritances INCORPOREAL are various, according to the various kinds of incorporeal inheritances; as,
Commons;
Profits appendre in another's ſoil;
Offices;
Tithes;
Rents by reſcue;
Replevin;
Encloſure;
Denial.

Diſſeiſin of corporeal inheritances are of two kinds:
With an ACTUAL ouſter, as is requiſite between
Jointenants,
Parceners,
Tenants in common.
Without an actual ouſter, even by the diſſeiſee's waving of poſſeſſion upon an entry made.
And all theſe kinds of diſſeiſins are done either to the party himſelf, or to his predeceſſor or anceſtor.
And the remedy is,
By writ of entry SUR DISSEISIN.

And theſe writs of entry SUR DISSEISIN are either,
In nature of an aſſize againſt the firſt diſſeiſor; or in the degrees; as in the PER; or PER ET CUI, againſt the feoffee of the diſſeiſor or his feoffee. Or,
They are in the POST; when the degrees are ſpent, or when the tenant comes in under the diſſeiſor in the POST;
As the lord BY ESCHEAT, &c.
And this learning of diſſeiſins, of aſſizes, and of entry ſur diſſeiſin, are large and comprehenſive titles, and of great variety and extent.

USURP-

USURPATION: this title refers only to advowſons; where one that has no right to preſent, preſents to a church, and his clerk is admitted and inſtituted, and continues in by ſix months.

The remedy is by WRIT OF RIGHT OF ADVOWSON for the patron in fee-ſimple.

And this alſo takes in all the learning of advowſons, and the proviſions made by the ſtat. Weſt. 2. to ſave the right of POSSESSORY actions againſt uſurpation;

Where it is upon the predeceſſor;

Where it is upon the anceſtor IN TAIL:

Where upon tenant for life, guardian in chivalry, &c.

DISCONTINUANCE: this is where he that ALIENS has not the FULL right, yet it puts the party injured thereby to his REAL action; as in theſe inſtances, viz.

When the alienation is by tenant in tail, the remedy is, for the heir in tail, by formedon IN DESCENDER; for the reverſioner, by formedon IN REVERTER; and for the remainder man, by formedon, IN REMAINDER. Co Lit. 326. b.

When the alienation was by the huſband ſeiſed in right of the wife, at common law the wife was driven to her CUI IN VITA; in or out of the degrees, as the caſe fell out.

But now ſhe may enter, UNLESS A DESCENT BE CAST, after her huſband's death, by the ſtatute 11 H. 7.

When it was by a biſhop, &c. aliening without the aſſent of the dean and chapter at common law, his ſucceſſor was driven to his writ of entry SINE ASSENSU CAPITULI.

But this is remedied by ſtat. 1 & 13 Eliz.

The learning of diſcontinuances is alſo very curious; as,

Who may diſcontinue; who not.

What

What ſhall be a diſcontinuance and what not.

And as the learning thereof is ample, ſo is that of the remedies thereof, by FORMEDON, &c.

DEFORCEMENT: and this is a larger, and a more comprehenſive expreſſion than any of the former; for a diſſeiſor, abator, intruder, diſcontinuer, uſurper, and thoſe that claim under them by feoffment or alienation, are all deforceors. But the proper application of the word is to ſuch a perſon, who, though he has not a juſt right, has yet recovered againſt, or BARRED HIM THAT HAS THE TRUE RIGHT; either,

By DEFAULT. And then the remedy for the party ſo deforced is,

If he had only a particular intereſt, by PER QUOD EI DEFORCEAT.

If he were iſſue in tail of him that ſo loſt, by FORMEDON.

If tenant in fee-ſimple, or his heir, by WRIT OF RIGHT.

Or in a real action of an inferior nature; as writ of entry, &c. and then,

Of the iſſue in tail of him that ſo loſt, or is barred. The remedy is, by formedon IN DESCENDER.

Of the tenant in fee-ſimple that ſo loſt, or is barred. The remedy is, by writ OF RIGHT (*n*).

(*n*) Since the diſuſe of real actions the proceeding by EJECTMENT is become the common mode of trying titles.

SECT.

SECT. XLIV.

Of wrongs that have THE COUNTENANCE *of legal proceedings of courts.*

HItherto I have proceeded in examining wrongs done by parties themſelves, I now come to conſider of wrongs done BY COURTS, or, THEIR OFFICERS, in relation to legal proceedings.

And they are of two kinds, viz.

When the court proceeds in a cauſe whereof they have NO juriſdiction.

When they proceed in cauſes whereof they have juriſdiction, but proceed ERRONEOUSLY.

The former of theſe is a wrong, and the party has his remedy or relief therein;

By NOT ſubmitting to the ſentence or judgment, and bringing his action againſt them that EXECUTE it:

By PROHIBITION from a SUPERIOR court; as when an eccleſiaſtical court proceeds in a cauſe of temporal conuzance; or an inferior court, that has a LIMITED juriſdiction, holds plea of a thing done OUT of its juriſdiction.

The latter is when they proceed erroneouſly, or by committing ſome miſtake in a matter within their juriſdiction.

This I call a wrong; not that the party that ſuppoſes himſelf injured has any remedy againſt THE COURT, or THE JUDGE that thus proceeds; for if men ſhould ſuffer barely for error in judgment, when there is no corruption, no perſon would be judge in any caſe. But I call it a wrong, becauſe, in truth, THE PARTY HAS A RIGHT TO BE RELIEVED againſt ſuch a judgment: and,

In

In cauſes eccleſiaſtical or maritime, the law has provided a relief againſt an erroneous judgment,

By APPEAL to other judges.

In cauſes of common law conuzance, errors or miſtakes in judgment are REVERSED.

In courts NOT of record, as county courts, and courts baron,

By writ of FALSE JUDGMENT.

In courts of record, wherein error may happen divers ways, viz.

By error of the jury in giving a falſe verdict:

The remedy is by ATTAINT (*o*).

By error or diſceit; if the ſheriff returns a party as ſummoned when he was not, whereby judgment is againſt him by default:

The remedy is, by WRIT OF DISCEIT.

By error of the court. And then

The remedy is,

Writ of error in a SUPERIOR court,

AUDITA QUÆRELA.

And here may come in the learning of writs of error, and audita querela.

SECT. XLV.

Concerning REMEDIES, *and the method of obtaining them.*

IN the former ſections I have conſidered of the various kinds of wrongs or injuries, and under

(*o*) The practice of ſetting aſide verdicts UPON MOTION, and granting NEW TRIALS, has long ſuperſeded the remedy by "ATTAINT."

thoſe

thoſe diſtributions have mentioned their ordinary remedies, and thereby have much contracted this title; wherein I ſhall only give ſome GENERAL RULES relating to the manner of the application of thoſe remedies; leaving every particular remedial writ, together with the proceſs belonging to it, to be conſidered and digeſted under their ſeveral titles in the former ſections.

Remedies for wrongs are according to the nature of thoſe wrongs, viz.

Eccleſiaſtical:
Civil.

Eccleſiaſtical remedies are ſuch as are applicable to wrongs of eccleſiaſtical conuzance, and take in or include theſe two generals, viz.

The courts or places where the ſaid remedies are to be had;
The proceſs preceding judgment and execution relating thereto.

Civil or temporal remedies are ſuch as concern either,

Maritime injuries;
Military injuries:
Civil or common law injuries.

In reliefs or remedies for maritime injuries, are conſiderable,

The court of relief: the ADMIRAL COURT.
The proceſs preceding ſentence, &c.

In remedies for military affairs, or matters of arms and honours,

The court is the court of honour, or military court.
The proceſs, ſentence, and judgment.
Now of little uſe.

SECT.

SECT. XLVI.

Remedies at common law; and firſt of thoſe WITHOUT SUIT.

THE law in many caſes provides a remedy WITHOUT SUIT, which in general is either,

By act of the party;

By act in law.

Remedies allowed by the party's OWN ACT, are in reference,

To things perſonal;

To things real.

In reference to things perſonal;

If another does wrongfully take or detain my goods, my wife, my child, or my ſervant, I may lawfully RETAKE them again, if I can, ſo I do it not riotouſly.

So I may defend myſelf, or them, by force, if aſſaulted.

In reference to things real.

In theſe and ſome other caſes, the law allows a man a remedy without being driven to it, viz.

In caſes of NUSANCE done to my freehold, I may REMOVE them, if I can, without riot; as,

To remove an obſtruction out of my way.

Or the over-hanging of another man's houſe over mine.

Or the obſtruction of water running to my mill.

In caſes of RENTS, I may diſtrain the goods or cattle that are levant and couchant upon the tenement charged therewith.

And ſo in caſes of CATTLE DOING DAMAGE upon my ground, I may diſtrain UPON MY GROUND damage feaſant. And ſo I may diſtrain cattle that are ſold for my toll.

In

In reference to LANDS.

I may diſtrain, and maintain my own poſſeſſion againſt any perſon that would eject or diſſeiſe me.

Where I have a right or title unto lands, and my entry not taken away, I may gain the poſſeſſion by my entry.

And this neceſſarily draws into examination theſe two things, viz.

TITLES of entry; which are either by breach of a condition IN FACT, or in LAW annexed to an eſtate that I have parted with, or my anceſtor.

And here comes in, OF CONDITIONS; what are good, and what not; when and to whom it gives an entry; and how deſtroyed or ſuſpended.

RIGHTS of entry: and this lets in all thoſe conſiderations that concern the titles of entry congeable, — of deſcents that toll entry, or continual claim,—of avoiding deſcents by infancy, by ſtat. 34 H. 8.

But regularly,

In perſonal things IN ACTION, as for debts, or covenants, or promiſes; or,

As to RIGHTS of real things, where the entry is by law taken away,—the party cannot be his own judge, but muſt have recourſe to the courts of common juſtice, except in the caſes following, viz.

By act IN LAW, in ſome caſes without ſuit, the party ſhall have remedy, where by his own act he cannot; as,

In things perſonal; as if the debtor make the debtee executor, HE may pay himſelf.

In things real; as where a man's entry is taken away; as by deſcent, or by diſcontinuance; yet if he come to the poſſeſſion without folly or covin, he ſhall be REMITTED.

And here all the curious learning of remitters comes in.

SECT. XLVII.

Concerning remedies at common law BY SUIT.

HItherto concerning wrongs and injuries in relation to things both real and perſonal, and remedies for the ſame without ſuit; I now come to conſider of remedies BY SUIT, and the means or method of their application.

Remedies by ſuit ſeem to be of two kinds;

Such as the parties provide for themſelves by mutual conſent:

Such remedies as the law provides for them.

Remedies that parties provide for themſelves are of two kinds;

By their own immediate accord:

By transferring the deciſion of it to others.

The former of theſe, viz. the IMMEDIATE CONSENT OF THE PARTIES, is that which in law is called AN ACCORD; which, WITH SATISFACTION ACCORDINGLY MADE, is in ſome caſes of perſonal injuries a bar to any other remedy.

6 Co. p. 44. And this lets in the learning of accords and concords; what are good, and what not; where they are a bar, and where not.

The latter of thoſe, viz. the transferring the deciſion TO OTHERS; which,

If to two, or more, is called an ARBITRAMENT:

If to one, an UMPIRAGE.

And here the large learning of arbitraments and awards; what a good ſubmiſſion; what a good award, or not; what remedy upon it, when and where it is a bar in perſonal actions, &c.

Secondly, ſuch remedies as the law provides are alſo of two kinds, viz.

Such remedies as the law provides, without ſuit whereof before.

Such remedies as the law provides in the courts of juſtice, SETTLED BY LAW, and according to thoſe conſtitutions touching actions and ſuits, that the law has provided and inſtituted.

And this takes in theſe conſiderations, viz.

The courts of judicatories, eſtabliſhed by law, for recovering of rights, and redreſſing of wrongs.

The remedies themſelves BY CERTAIN WRITS inſtituted by law, and applicable to thoſe ſeveral wrongs.

The proſecution or purſuit of thoſe remedies in the ſaid courts.

The firſt of theſe concerns the large learning of the juriſdiction of courts. And foraſmuch as there are ſeveral entire tracts written thereon, and I have before touched upon them, I ſhall here forbear to ſay any thing further herein; only that that learning may with reaſon enough be transferred hither, at leaſt ſome particulars thereof.

The ſecond, touching the natures and applications of thoſe remedies, I have in the former ſections, under every ſeveral kind of wrong or injury, mentioned the reſpective remedy, and therefore ſhall not again repeat it here.

The third, which is the proſecution, or purſuit, of thoſe remedies, is the buſineſs of this diviſion.

But before I enter upon that matter, I ſhall premiſe theſe two things, viz.

Firſt, that the beſt way to meet with all the titles of the law in this buſineſs, will be to purſue

the ſame in the order and method of the proceedings themſelves, without any other diſtribution.

Secondly, that there ſome things wherein the purſuit of a real ſuit and perſonal do differ; as in the PROCESS, the JUDGMENT, and the EXECUTION. In moſt other things they agree; or, at leaſt, the purſuit of a real action contains all the general learning of a perſonal action, and much more.

Where therefore there is a ſignal difference, I ſhall obſerve it by the way, without running thro' the whole procedure of a real and perſonal action diſtinctly; and ſhall only here obſerve, that the general parts of a ſuit are theſe:

The proceſs.
The pleading.
The iſſue.
The trial.
The judgment.
The execution.
The appeal.

SECT. XLVIII.

Of proceſs and appearing.

FIRST, where a wrong is done, or a right detained, the party injured is to make his application or ſuit for that remedy which the law ordains; and in order thereto, to take out ſuch writ or proceſs as the law, on the circumſtance of his caſe, requires.

The common, uſual, ordinary proceſs are as follow:

In perſonal actions,
Summons, attachment, diſtreſs, capias, (*p*) alias,

(*p*) The CAPIAS, generally ſpeaking, is peculiar to the court of common pleas; the ordinary proceſs in perſonal actions,

alias, pluries & exigent, and in ſome it begins with attachment.

In real actions,

It is ſummons, grand cape, and judgment; or AFTER appearance, petit cape, and judgment.

In mixed actions,

In aſſizes,—attachment; and upon default, the inqueſt taken by default.

In waſte,—attachment and grand diſtreſs, and an enquiry of the waſte, &c.

Every proceſs gives the defendant a day in court; and this lets in theſe ſeveral things, viz.

JOUR IN COURT, and the variety of it.

And incident to this, is,

Adjournment; and,

Diſcontinuance.

And at that day, or, jour in court, the defendant or tenant either appears, or not appears.

Here of appearance, and its diverſity;

By guardian, or prochein amy;

By attorney:

In perſon.

If there be not an appearance,

Either a DEFAULT is made:

And here of the proceſs upon default,

In perſonal actions;

In real actions.

Or there is AN EXCUSE of appearance,

And therein ſaver default;

By protection;

By eſſoin prayed.

And here all the learning of eſſoins;

Their nature,

Their diverſity; as,

Common eſſoins,

Mirror, c. 5. § 1.

actions, in the court of king's bench, being the bill of Middleſex, and the latitat, alias latitat, &c. The ordinary proceſs in the exchequer-office of pleas are, Quo minus ad reſpondendum, ſubpœna ad reſpondendum, venire facias ad reſpondendum.

Service le roy, &c.
On the other ſide, as to the plaintiff.
The plaintiff either appears; or,
Makes default, and thereupon a non-proſecution.
And here of the nature and variety of Nonſuits;
Retraxit, &c.

SECT. XLIX.

Of PLEADING.

SECONDLY, I come to pleading.
If both parties appear, the plaintiff declares or counts.
And here of,
Counts.
Declarations.
And the defendant or tenant's part is after imparlance TO PLEAD.
And ſuch plea is either,
Dilatory; or,
To the matter or right of the complaint.
Dilatory pleas are of ſeveral ſorts;
To the JURISDICTION of the court:
From the place where the ſuit ariſes;
From the thing in controverſy, as, ancient demeſn. Or,
To the impotency, or NON ABILITY of the plaintiff, which is very various; as,
Alien { Amy. / Enemy.
Outlawry { In perſonal actions. / For felony.
Excommengement.
And formerly villenage. And,
Profeſſed.

In-

In ABATEMENT;
And this either,
Of the count,
Of the writ.
VIEW DEMANDED.
And this is a large title.
AID PRAYED;
Of the king:
And here of rege inconſulto, procedendo.
Of a common perſon.
And here of AID.
The different kinds of aid; as,
Of the reverſioner or remainder-man.
Of the patron and ordinary.
VOUCHER; which is a very large title.
And here of voucher;
In what action;
Of what perſon.
Counter-plea of voucher.
Proceſs againſt vouchee.
Pleading of vouchee.
Recovery in value.
AGE PRIER:
For minority of the demandant.
For nonage of the tenant.
And here of prier in aid of vouchee, &c.
And all the learning of age.
And herein comes alſo, what and when pleas dilatory are peremptory,
After demurrer;
After trial:
And of pleas in abatement AFTER THE LAST CONTINUANCE.

Pleas that go to the right or MERIT of the complaint, are of two ſorts;

Firſt, pleas TO THE ACTION, which DENIES the SUBSTANCE of the complaint;
And commonly make either,
A GENERAL iſſue; as,
In treſpaſs, not guilty;

In debt upon a contract,—nil debet.
In aſſumpſit,—non aſſumpſit.
In aſſize,—nul tort, nul diſſeiſin.
In dower,—nunque de ſeize de dower.
In a writ of right, that the tenant has more right to hold, than the demandant has to demand.
Or a COMMON iſſue; as,
In debt on bond, or action of covenant,—non eſt factum.
In an aſſize of mortdanceſtor, aile, beſaile, &c. that the anceſtor was never ſeized.

Secondly, pleas IN BAR: theſe are very various and different, according to the ſeveral kinds of the tenants or deſcendants caſe.

And lets in all the learning of bars, &c. as,

Bars are either ſuch as are,
PROPER.
COMMON.

Pleas in bar are therefore conſiderable,
In their nature or matter.
In their qualities or manner of pleading.

Bars according to the nature of the action, and caſe of the parties, are very various and different, and therefore here all the learning of ſuch bars comes in, yet ſomewhat concerning them follows.

Proper bars are,
Such as are applicable only to REAL or MIXED actions; as,
Fine;
Feoffment;
Releaſe of right;
Warranty, &c.
Of the plaintiff;
Or his anceſtor.

Such as are proper to PERSONAL actions only; as,
Accord with ſatisfaction;
Arbitrament;
Performance,

Of

Of the condition.
Of the bond.

Such bars as are common to BOTH, yet diverſifyed oftentimes with ſuch diverſifications as are applicable to the nature of the action; as,

RELEASE of action.
LIMITATION of time by act of parliament, elapſed.
ESTOPPELS;
And here of the ſeveral kinds of eſtoppels:
By matter OF RECORD.
By matter IN PAIS; as,
Deeds indented or poll.
And here of the whole learning of eſtoppels;

For note, eſtoppels are not only the matter of bars, but of replications, rejoinders, and all other pleadings.

Concerning bars as to their qualities or manner of pleading, the ſame common rules of pleading for the moſt part concerns all kinds of pleading.

And therefore I ſhall here ſhortly inſert them once for all, viz.

That the plea be SINGLE, and not double.
And here of double pleas.
That it have convenient CERTAINTY of time, place, and perſons.
That it ANSWER the demandant's or plaintiff's count or plaint.
That it be ſo pleaded, that it may be TRIED.

When the defendant has pleaded, what, next follows is, the plaintiff or demandant's anſwer to the defendant's plea; and this is called a REPLICATION.

And here of the general rules, &c. of replications, viz.

That it be,
CERTAIN;
SINGLE:
ANSWERING THE BAR, &c.

And

And this replication either,

DENIES or TRAVERSES the bar or plea of the defendant; and THEN AN ISSUE IS TENDERED, which regularly muſt be joined in by the other party, and then the parties are at iſſue.

And here all the learning of TRAVERSE; what is traverſable, or not; how it muſt be made, either ſimply without an inducement, or with an inducement; and concluding ABSQUE HOC to the matter alledged by the defendant.

Or CONFESSES AND AVOIDS.

And here all the learning of confeſſing and avoiding; and then there is NO iſſue offered by the replication: but poſſibly the pleadings run on to rejoinder, ſurrejoinder, rebutter, or ſurrebutter.

For if the plaintiff replies ſo as no iſſue be offered, this gives occaſion to the defendant to REJOIN.

And here of rejoinders, and how he muſt MAINTAIN his bar, and NOT DEPART from his plea.

And here of DEPARTURE IN PLEADING.

SECT. L.

Of ISSUES.

THUS far of pleading. Now by this time either by the plea, replication, rejoinder, &c. the parties are deſcended to AN ISSUE, viz. to ſomething AFFIRMED by the one party AND DENIED by the other; which affirmation and denial is called AN ISSUE; for now the parties have no more to do, unleſs a matter happen to EMERGE AFTER iſſue joined, and the laſt continuance.

This, if it be pleaded, is called a plea PUIS LE DARREIN CONTINUANCE.

So

So that their buſineſs being at iſſue, they have no more to do but to expect the trial and determination of that iſſue.

Now iſſues are of theſe kinds, viz.

An iſſue joined upon a matter of LAW, which is to be determined by THE COURT.

And this iſſue is called a DEMURRER.

An iſſue OF FACT, which is of two kinds;

An iſſue joined touching a matter of RECORD, on nul tiel record pleaded, &c.

An iſſue joined touching a matter IN PAIS; as,

Whether ſuch a deed were made.

Whether ſuch a feoffment were executed, &c.

SECT. LI.

Of TRIALS.

AND now iſſue being joined between the parties, they have no more to do but to expect the trial of that iſſue; and for that end they have DAYS OF CONTINUANCE given. Vide Co. 9. fol. 30.

Here of continuances, &c.

Trials are of ſeveral kinds, according to the nature of iſſues, and the ſeveral appointments and directions of the law touching the ſame, viz.

Trial BY RECORD; as,

When iſſue is joined, whether there be any ſuch record or no.

Trial BY INSPECTION; as,

Upon error to reverſe a fine levied by an infant; or in audita querela to avoid a recognizance acknowledged during his minority.

Trial BY PROOFS; as,

Where iſſue in dower is, whether the huſband be living or not.

Trial by EXAMINATION; as,

Where

Where an action of debt upon account is brought for things not lying in account.

Trial by CERTIFICATE:
- Of the conſtable and marſhal, whether the party be in ſervice.
- Of the biſhop, by mandate from the ſecular court, as in caſe of general baſtardy.
  - So of iſſues upon the right of marriage between the parties to the ſuit.
  - So of plenarty by inſtitution into churches.

Trial BY BATTLE:
- In appeals.
- In a writ of right.

Trial BY JURY (q).
- And this takes in a large field of learning.

Trials by jury are,
- Extraordinary.
- Ordinary.

Extraordinary: in writ of right,
- In attaint. Quære appeals.

Ordinary: by TWELVE MEN.

Wherein conſider;
- The PROCESS to bring in the jury,
  - In C. B.—by venire facias & habeas corpus,
  - In B. R.—by venire fac' & diſtringas juratorum.
- The TALES for want of a full jury appearing.
- CHALLENGES of all ſorts;
  - To the array:
  - To the polls.
- The OATH of the jury.
- The EVIDENCE to be given to the jury:
  - What allowable to be given;
  - And when.

Co. Lit. p. 227. b.
- VERDICT of the jurors:
  - General verdict.
  - Special verdict.

(q) To the ſeveral kinds of trial enumerated by ſir Matthew Hale, may be added "trial by wager of law."

What

What DEFAULTS or miſcarriages impeach the verdict.

The POSTEA, or return of the verdict by the judges of niſi prius.

SECT. LII.

OF JUDGMENT.

THE fifth act in this buſineſs of proſecution or ſuit, is judgment.

And here the whole learning of judgment, comes in, viz.

What ſhall be ſufficient TO STAY judgment.

And herein,

Of arreſting judgments.

Of reverſing judgments.

Upon what it is given; which for the moſt part is upon theſe premiſſes or precedents.

Upon DEFAULT, after default; as in real actions after the grand diſtreſs in,

Waſte,

Quare impedit.

Upon CONFESSION,

Nihil dicit;

Non ſum informatus.

Upon DEMURRER.

Upon TRIAL of the iſſue, according to the various methods of trial above mentioned.

The ſeveral kinds of judgments.

In ſuits real.

In ſuits perſonal.

INTERLOCUTORY, and not final; as,

Awards upon the writ affirmed, or other dilatory pleas, where the judgment in many caſes only is,

Reſpondeat ouſter.

Final, but NOT compleat:

And that either,

Incompleat IN PART, but compleat in the reſidue; as

Where the judgment is given for the thing demanded, but the damages not yet inquired of.

Incompleat in THE WHOLE; as,

Where a judgment is given for the party to recover his damages, where the damages are the principal; wherein,

The compleat judgment is not given till the writ of inquiry returned.

FINAL and compleat, with reſpect to the action upon which it is given.

Final, not only as to the action upon which it is given, but to all other actions touching THAT thing; as,

Judgment final, in a writ of right after the iſſue joined, &c.

The forms of entry of judgments.

SECT. LIII.

Of EXECUTION.

THE ſixth act in this buſineſs of ſuit, is execution.

This is a great field of learning.

Executions ſeem to be of two kinds:

Within the year.

After the year.

The former of theſe is alſo of two kinds:

In reference to LANDS recovered.

In reference to DEBTS or DAMAGES recovered.

Firſt, in relation to lands recovered, two things are conſiderable:

The writ or mandate of execution.

The

The execution of the ſaid writ.

Touching the former;

The writ or mandate itſelf is of two kinds, in relation to the ESTATE recovered:

If a FREEHOLD,—hab' fac' ſeiſinam.

If a CHATTEL,—hab' fac' poſſeſſionem.

I do not here meddle with the executions of other kinds of writs, as quod permittat, replevin, &c. becauſe they may come in in the former ſection, where the writs themſelves are mentioned, and they are various.

Touching the latter;

In the execution of the writ is conſiderable:

The officer that is to make it.

And here of the office of ſheriff;

The manner of his making;

His power;

His duty in making returns, &c.

The manner of doing it.

And here of the POSSE COMITATUS.

Sed vide ante, of ſheriffs, ſec. xii.

In reference to debts or damages recovered, there are alſo conſiderable;

The nature of the proceſs:

The manner of its execution.

The PROCESS itſelf is of the following kinds:

And ſo are the methods or manner of the execution.

(N. B. They are herein joined together.)

The BODY only,—by capias ad ſatisfaciend'.

And here of capias:

Where it lies;

How executed;

When with, and when without, breaking open doors.

What kind of execution it is;

Whether without ſatisfaction.

And here of NON OMITTAS:

As alſo of eſcapes.

GOODS

Goods only,—by fieri facias.
And here of that learning:
How, upon what, and by whom, it is executed.
And whether a return be neceſſary.
Profits of lands only,—by levari facias.
And here of that:
What profits ſhall be levied;
And whereupon.
Part of the lands, and all the goods,—by elegit.
Here of elegit:
Where it lies;
What lands extendible;
How the extent ſhall be made;
How returned;
And where a re-extent.
Body, lands, and goods,—by extent upon a ſtat. merchant, or ſtat. ſtaple, or a recognizance in nature of a ſtat. ſtaple.
And here of theſe executions.
What they are;
The manner of executing the ſame, &c.
Touching executions after the year paſt;
When the proceeding is,
To revive the judgment. And,
Obtain execution thereof;
By scire facias.
And here all the learning of ſcire facias.

SECT. LIV.

Of redreſs of injuries, by error, &c.

LASTLY, I come to remedies that perſons have, to be relieved againſt the proceedings aforeſaid, in caſe they have juſt cauſe ſo to be.

And

And they are theſe, viz.

By WRIT OF ERROR; to remove the record into a SUPERIOR court, to examine the errors, in caſe the inferior court has erred in point of proceeding, judgment, or execution awarded.

And here comes in that great title error, with its adjuncts and appendixes, viz.

Where it lies;
When it lies:
In what court.
When 'tis a ſuperſedeas, &c.
What aſſignable for error.
The proceſs to bring in the party that recovered.
The judgment therein, both,
When the former is affirmed; and,
When it is REVERSED.
Execution of judgment upon the affirmation or reverſal:
And here of EXECUTIONS in error.

By writ of ATTAINT, where the jurors give a FALSE verdict.

And here all the learning of attaints.

By writ of DISCEIT, where the judgment is by default, and the party never duly ſummoned.

Where the party has loſt by DEFAULT in a REAL action, yet has good right, when yet by reaſon of his default, he did not ſhew it, viz.

By writ of right for him that loſt by default, or his heir, having a FEE-SIMPLE.
By writ of quod ei deforceat, if he had only an eſtate for LIFE, or in TAIL.
By formedon in deſcender, reverter, remainder. Vide ante.
And here at large the learning of FAUXIFIER DE RECOVERY.

Where the party is put out BY EXECUTION, wher in he had no day to plead or anſwer, as

in executions by capias, elegit, ſtatute merchant, &c.

By AUDITA QUERELA.

And here of the whole learning of AUDITA QUERELA.

And thus far of the partitions of the titles of the law of England, and the analyſis thereof, in relation to rights, &c. of a civil nature.

As to pleas of the crown, and matters criminal, that ſhould here enſue, they are already drawn up, or perfected by me, in a ſhort tract, OF PLEAS OF THE CROWN, which I ſhall add to this in due time.



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